



Australian Government

Defence Honours and Awards Appeals Tribunal

Gilchrist and Street and the Department of Defence [2017] DHAAT 016 (20 July 2017)

File Number(s) 2015/044, 2015/045

Re **Captain A. Gilchrist, DSM and Sergeant A. Street**
Applicants

And **The Department of Defence**
Respondent

Tribunal Mr G. Mowbray, (Presiding Member)
Brigadier M.D. Bornholt, AM (Retd)
Brigadier K.J. O'Brien, CSC (Retd)

Hearing Date 31 May 2017

DECISION

On 20 July 2017, the Tribunal recommended to the Minister:

- a. that the decision by the Chief of Army to refuse to recommend a gallantry award for Captain Anthony Gilchrist, DSM for his actions during his tour of Iraq with the Combined Explosive Exploitation Cell in 2005 be affirmed; and
- b. that the decision by the Chief of Army to refuse to recommend a gallantry award for Sergeant Andrew Street for his actions during his tour of Iraq with the Combined Explosive Exploitation Cell in 2005 be affirmed.

CATCHWORDS

DEFENCE HONOUR – *Distinguished Service Decorations* – *Gallantry Decorations*
– *Iraq - Combined Explosive Exploitation Cell* – *Improvised Explosive Device*

LEGISLATION

Defence Act 1903 – ss 110V(1), 110VA, and 110VB(1), (6)
Defence Force Regulations 1952 – Reg 93B Sch 3
Commonwealth of Australia Gazette No. S25, Gallantry Decorations Regulations and Distinguished Service Decorations Regulations dated 4 February 1991

REASONS FOR DECISION

Introduction

1. On 21 February 2011, the Government requested that the Tribunal inquire into and report on *unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry). As part of the Terms of Reference for the Inquiry, the Tribunal was directed to receive submissions from the public supporting recognition for those they thought worthy of higher recognition. Submissions were received from Sergeant Andrew Street and Captain Anthony Gilchrist (the Applicants).¹ Their submissions sought recognition for each other for ‘significant acts of bravery’ during their tours of duty in Iraq with the Combined Explosive Exploitation Cell (CEXC) in 2005.²

2. Captain Gilchrist was awarded the Distinguished Service Medal (DSM) on 14 November 2005 for ‘distinguished service as the Operations and Intelligence Officer for the CEXC during Operation Catalyst’;³ and Sergeant Street was awarded the Commendation for Distinguished Service in June 2006 for ‘distinguished performance of duty as the CEXC Intelligence Analyst during Operation Catalyst’.⁴

3. On 14 March 2013, the Australian Government referred the Applicants’ Valour Inquiry submissions to the Chief of Army (CA) seeking a determination on whether the submissions should be referred to the Tribunal for further review. On 7 January 2015 Army Headquarters provided advice to the Parliamentary Secretary to the Minister for Defence (the Parliamentary Secretary) that recommended that the submissions should not be referred back to the Tribunal:

*as there is no evidence of maladministration and no new compelling and authoritative evidence presented that meets the criteria for review of a higher award than that already received ... by the individuals ...*⁵

4. On 27 April 2015 CA advised both Captain Gilchrist and Sergeant Street that their respective submissions had been reviewed and Army could not locate any evidence that their actions were not appropriately considered. He also advised that the Parliamentary Secretary had accepted his recommendation that no further action be taken for another award.⁶

5. In November 2015 Captain Gilchrist and Sergeant Street made application for a review of the CA decision in relation to recognition for each other.⁷ They asserted that Distinguished Service decorations were ‘inappropriate’, and that they should both be recognised through the award of the Star of Gallantry (SG).⁸

¹ Submission 135 Andrew Street on behalf of Anthony Gilchrist and Submission 134 Anthony Gilchrist on behalf of Andrew Street received on 2 August 2011

² E-mail from Sergeant Street to the Tribunal dated 28 June 2011

³ *Commonwealth of Australia Gazette* No. S199 dated 14 November 2005

⁴ Queen’s Birthday Honours List 2006

⁵ Ministerial Advice from AHQ – OCA-AHQ/OUT/2014/611 dated 7 January 2015

⁶ OCA/OUT/2015 R21083001 and R21082986 to Gilchrist and Street dated 27 April 2015

⁷ Applications for Review of Decision – Street and Gilchrist dated November 2015

⁸ *Ibid.* – Street Att 7, Folio #73, Gilchrist Att 8,

Tribunal Jurisdiction

6. Pursuant to s110VB(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 a person within the Department of Defence or the Minister to refuse to recommend a person for an honour or award in response to an application. Regulation 93B of the *Defence Force Regulations 1952* defines a defence honour as being those awards set out in Part 1 of Schedule 3.⁹ Included in the defence honours set out in Part 1 is the SG.

7. The Tribunal was satisfied that the Applicants' submissions to the Valour Inquiry constituted an application as required by s110V(1)(c) of the Defence Act. The Tribunal also considered that the CA's recommendation to the Parliamentary Secretary that 'no further action be taken' constituted a refusal to recommend further recognition or gallantry awards for Captain Gilchrist or Sergeant Street, satisfying the requirements of s110V(1)(a) and (b) of the Defence Act. The Tribunal therefore has jurisdiction to conduct the review and was satisfied that the *reviewable decision* is the decision by the CA on 27 April 2015 to refuse to recommend a gallantry award (later defined as the SG) for these men. The Tribunal is therefore bound by the eligibility criteria that governed the making of that decision in 2015 as required by s110VB(6) of the Defence Act.

8. In accordance with s110VB(1) of the Defence Act, as the Applicants seek a defence honour, the Tribunal does not have the power to affirm or set aside the decision but may make recommendations regarding the decision to the Minister.

Conduct of the review

9. In accordance with its *Procedural Rules 2011*, on 14 January 2016, the Tribunal wrote to the Secretary of the Department of Defence informing him of Sergeant Street's application and requested a report on the material questions of fact and the reasons for the decision made in relation to the request for a higher level of recognition for Captain Gilchrist.¹⁰ The Tribunal also requested that the Secretary provide copies of documentation relevant to the reviewable decision and that he provide a copy of Captain Gilchrist's service records. On 2 March 2017 the Tribunal made a similar request to the Secretary in relation to Captain Gilchrist's application on behalf of Sergeant Street.¹¹

10. On 14 February 2016 the Director General Personnel – Army (DGPERS-A) provided a response to the Tribunal regarding recognition for Captain Gilchrist and recommended that 'the original decision to award Captain Gilchrist the DSM be upheld'.¹² The response included material supporting the original nomination for the

⁹ Under Section 85 of the *Defence Regulation 2016*, the *Defence Force Regulations 1952* continue to apply to an application made under those regulations before their repeal on 1 October 2016.

¹⁰ DHAAT/OUT/2016/007 dated 14 January 2016

¹¹ DHAAT/OUT/2017/75 dated 2 March 2017

¹² DGPERS-A/OUT/2016/R24807323 dated 14 February 2016

DSM. The response was provided to Sergeant Street on 24 February 2016 for comment.¹³

11. On 2 May 2017 the Tribunal received a letter from the Directorate of Honours and Awards in the Department of Defence (the Directorate) in relation to recognition for Sergeant Street.¹⁴ The Directorate provided further material in relation to Army's 2005 consideration of the matter and a set of briefing papers sourced from Joint Operations Command (JOC). These papers indicated that in February 2009, Captain Gilchrist and Sergeant Street had submitted nominations for bravery decorations to the Australian Bravery Decorations Council (ABDC) in relation to each other's actions on 25 July 2005 and in other incidents. The material was passed by ABDC to JOC for consideration. Attached to the material was a written decision by the Commander Joint Operations Command (CJOPS), Lieutenant General M. Evans which determined that no action would be taken as 'both men did a great job and were appropriately recognised at the time for their contribution, their leadership and their courage'.¹⁵ The Defence response was provided to Captain Gilchrist on 5 May 2017 for comment.¹⁶

12. The Tribunal decided that it would need to be better informed about the training, employment and nature of explosive ordnance disposal and the general roles and tasks of the CEXC and accordingly, sought a briefing from the Commanding Officer of the Australian Explosive Hazard Training Centre, Lieutenant Colonel M. Medina, DSM. This briefing was delivered to the Tribunal on 8 May 2017. The Tribunal met on 19 May 2017 and considered the material provided by Defence, the Applicants and the Tribunal's own research. The Tribunal confirmed the scope of the review, the decisions under review and jurisdiction, witness lists and drafted questions for the subsequent hearing.

13. The Tribunal noted that the hearing into this matter may need to discuss sensitive matters involving current operational techniques and procedures and matters of national security. In accordance with its *Procedural Rules* dated 2011, the Chair directed that the hearing be conducted in private.

14. The Applicants were invited to provide evidence at a hearing held in Canberra on 31 May 2017. Defence was represented by Colonel M. Collie from JOC, Ms A. Augustine from the Directorate and Ms R. Nelson from Army. Evidence was also given at the hearing by Commodore G.A. Ledger, RAN who had been the Applicants' National Commander in Iraq from May 2005, his Chief of Staff, Colonel P.A. Davies; Commander B. Kelly, USN who was the Applicants' Commanding Officer from June 2005 and Air Vice Marshal G. Evans who had been the Applicants' National Commander in Iraq until May 2005.

The Combined Explosives Exploitation Cell

¹³ DHAAT/OUT/2016/061 dated 24 February 2016

¹⁴ DH&A/OUT/2016/0087 dated 2 May 2017

¹⁵ CJOPS Letter to J1/4 dated 9 August 2009

¹⁶ DHAAT E-mail to Captain Gilchrist dated 8.28am 5 May 2017

15. The CEXC was a small coalition unit created in Iraq in 2004 as part of a strategy to counter the increasing use of Improvised Explosive Devices (IED) by the enemy. The unit was commanded by a United States officer and consisted of two five man teams. Each team was led by a Captain who was a qualified Ammunition Technical Officer (ATO), one from Australia and one from the United Kingdom. These two officers also performed staff jobs in the unit headquarters when not responding to tasks as a team.

16. The unit's role was to investigate post blast and explosive incidents and gather information relating to manufacture, detonation and tactical functioning of devices.¹⁷ Witnesses stated that a team would be task structured and usually consisted of a Captain commander supported by up to four other personnel drawn from Federal Bureau of Investigation (FBI) technicians, Federal Bureau of Alcohol Tobacco and Firearms (ATF) operatives, Army Intelligence Analysts and specialists such as Electronics Countermeasure personnel.

17. The Tribunal was advised that the 'normal' response procedure was that following an incident, the site would be secured by the local unit who would call upon a dedicated specialist Explosive Ordnance Disposal (EOD) team to make safe or deal with explosives before the CEXC team entered the site to conduct forensic analysis and exploitation.¹⁸ It was emphasised that the CEXC role was not to render devices safe, but to conduct analysis. Whilst rendering safe could be done 'in extremis', for example when needed to save lives, the CEXC was not equipped to conduct this task as this was an EOD team role. As part of the exploitation, the CEXC would often remove devices and material after they were made safe and transport these to the CEXC base for laboratory analysis.

18. Air Vice Marshal Evans and Commander Kelly both gave evidence that the tempo of operations in 2004/2005 was extreme and that IED incidents were occurring on a daily basis. The tempo required frequent deployments of the CEXC under extremely hazardous circumstances. Witnesses also stated that in 2004/2005 the CEXC was a new organisation and their tactics, techniques and procedures were evolving based on experience and lessons learnt. The Tribunal noted Captain Gilchrist's evidence that he and Sergeant Street were not specifically force prepared for the CEXC as it was a developing concept and new to the Australian Defence Force.

The Applicants' Service Records

19. **Captain Gilchrist.** Captain Gilchrist enlisted in the Australian Regular Army on 6 May 1987 and was allotted to the Royal Australian Army Ordnance Corps. He spent the early part of his career as an administrative clerk working in various units in south-east Queensland.¹⁹ In 1999 at the rank of Sergeant he attended and was qualified on a seven-month Ammunition Technician course followed by a one month IED Disposal course. At the conclusion of these courses he trade-transferred to be an

¹⁷ Commander Kelly USN oral evidence 31 May 2017

¹⁸ Briefing by Commanding Officer Explosive Hazard Training Centre, LTCOL M. Medina – 8 May 2017

¹⁹ ADO Service Record 8248914 Gilchrist dated 1 June 2016

Ammunition Technician and completed a number of postings in this trade. On 19 January 2004, he was commissioned as a Captain and posted as an ATO.

20. Captain Gilchrist's service record indicates he was deployed to Operation Catalyst in Iraq and attached to the CEXC on 22 February 2005. He returned to Australia on 23 August 2005. After ten months at 10 Force Support Battalion in Townsville in 2006 he took long service leave and then transferred to the Army Reserve on 9 November 2007 having completed 20 years of service. Captain Gilchrist's service record states that he has received the following honours and awards:

- Distinguished Service Medal;
- Australian Active Service Medal with Clasp 'IRAQ 2003' and Clasp 'EAST TIMOR';
- Iraq Medal;
- Australian Defence Medal;
- Defence Long Service Medal with 1st Clasp;
- United States Bronze Star Medal;
- Returned from Active Service Badge; and
- Soldier's Medallion for Exemplary Service.

21. **Sergeant Street.** Sergeant Street is a lateral transferee from the British Army Intelligence Corps. He enlisted in the British Army on 25 August 1992 and served for nine years as an intelligence analyst/operator.²⁰ He made application to transfer to the Australian Regular Army as an Operator Intelligence and Security on 24 January 2002. Sergeant Street's service record states that he was enlisted into the Australian Regular Army on 1 September 2003 as a Sergeant and allocated to the Australian Intelligence Corps.²¹ His first posting was to the 1st Intelligence Battalion.

22. Sergeant Street's service record indicates he was deployed to Operation Catalyst in Iraq on 6 February 2005 and returned to Australia on 10 August 2005. On 23 January 2006 Sergeant Street applied to transfer to the Army Reserve. The application was approved and he transferred on 1 September 2006 having completed 3 years of service. Sergeant Street's service record states that he has received the following honours and awards:

- Commendation for Distinguished Service;
- Australian Active Service Medal with Clasp 'IRAQ 2003';
- Australian Service Medal with Clasp 'EAST TIMOR';
- Iraq Medal;
- Australian Defence Medal;
- General Service Medal 1962 with Clasp 'NORTHERN IRELAND';
- Queen's Golden Jubilee Medal; and
- Returned from Active Service Badge.

The Applicants' Distinguished Service Decorations

²⁰ ADF Application for Lateral Entry – A.J. Street dated 24 January 2002

²¹ ADO Service Record 8444031 Street dated 28 March 2017

23. **Captain Gilchrist.** Captain Gilchrist was nominated for the DSM by the Officer Commanding CEXC, Commander B.G. Kelly, USN on 8 August 2005.²² During the hearing, it was established that the citation and narrative for the DSM had been drafted by the Chief of Staff, Joint Task Force 633 (JTF 633), Colonel P.A. Davies. Colonel Davies said at the hearing that considerations for honours and awards were done on an individual basis at the end of each person's tour and that in relation to Captain Gilchrist, he thought he would have discussed it with the CEXC but wasn't sure.²³ He stated that he had discussed recognition for Captain Gilchrist with staff at JOC in Australia and that the DSM was 'the highest level of award' that he processed during his tour.

24. Colonel Davies stated that he processed the nomination as an 'immediate award' so that Captain Gilchrist would be recognised 'as close to the end of the tour as possible'. Colonel Davies said that he decided on the DSM as the appropriate award after consultation with his own staff and in recognition of the fact that Captain Gilchrist had performed 'above and beyond expectations'. He said that he considered the DSM appropriate as it recognised leadership and that whilst he had considered a gallantry award, in his view there was insufficient evidence to support individual gallantry. He did however agree that Captain Gilchrist was exposed to 'hazardous circumstances'.

25. The Australian National Commander and Commander JTF 633 Commodore Ledger stated that he was aware of the nomination and that he had authorised Colonel Davies to deal with honours and awards on his behalf.²⁴ Commander Kelly gave evidence that he must have signed the nomination form for Captain Gilchrist's DSM but he could not recall sitting the document or being briefed on the honours system.²⁵ He also said that he could not recall whether the citation and narrative were attached to the form.

26. The narrative for Captain Gilchrist's DSM states:

For distinguished service as the Operations and Intelligence Officer for the Combined Explosive Exploitation Cell during Operation Catalyst.

...

As a member of the Combined Explosive Exploitation Cell, Captain Gilchrist played a key role in the collection, exploitation and dissemination of technical information and forensic evidence relating to the construction and emplacement of improvised explosive devices by Anti-Iraqi Forces. His duties required frequent exposure to such devices, often under direct and indirect enemy fire. Captain Gilchrist consistently displayed exemplary leadership and personal courage to ensure mission success and minimise the danger to his staff and other Coalition forces.

Captain Gilchrist's dedication, courage and professionalism are illustrated by an incident that occurred on 24 July 2005. On that date, the duty Combined Explosive Exploitation Cell team responded to the detonation of a large improvised explosive device which had destroyed an armoured vehicle and

²² Nomination for Honours and Awards (AD-104) – Gilchrist dated 8 August 2005

²³ Oral Evidence – Colonel Peter Davies, by telephone 31 May 2017

²⁴ Oral Evidence – Commodore Geoff Ledger, RAN 31 May 2017

²⁵ Oral Evidence – Commander Brian Kelly, USN by telephone 31 May 2017

killed four United States Army personnel. Upon the team's arrival, a second device was detonated, seriously injuring the team leader. Captain Gilchrist was despatched in response to the second explosion. Acting on instinct, Captain Gilchrist personally conducted a fingertip search around the area after it was deemed safe. He discovered a third explosive device – an improvised pressure switch rigged to two 122mm high explosive shells. He then directed an Explosive Ordnance Disposal team to the exact location of the bomb, and the device was subsequently rendered safe.

Captain Gilchrist's conduct has drawn high praise from Coalition partners, including his United States Commanding Officer. His distinguished service in the face of danger and in most difficult circumstances has been of the highest order and in accordance with the finest traditions of the Australian Defence Force.

27. As previously discussed, the nomination was processed as an immediate award on 8 August 2005. Rear Admiral R. Moffitt, AM, RAN, the Deputy Commander Joint Operations (DCJOPS) in Australia recommended the nomination on 22 August 2005. This recommendation was subsequently endorsed by the Chief of the Defence Force (CDF) on 23 September 2005.²⁶ The Minister Assisting the Minister for Defence wrote to the Governor-General on 4 October 2005 recommending that Captain Gilchrist receive the DSM for 'distinguished service' in the Middle East Area of Operations. She stated that the award was being recommended for:

*specifically one act of dedication, courage and professionalism at an incident that occurred on 24 July 2005 ... I consider Captain Gilchrist to be deserving of separate recognition and recommend that you approve this award.*²⁷

28. The DSM was approved by the Governor-General and gazetted on 14 November 2005.²⁸ The gazetted citation states:

For distinguished service as the Operations and Intelligence Officer for the Combined Explosive Exploitation Cell during Operation CATALYST in Iraq Captain Gilchrist played a key role in the collection, exploitation and dissemination of technical information and forensic evidence relating to the construction and emplacement of improvised explosive devices by Anti-Iraq Forces. His conduct when responding to incidents involving such devices, often under the threat of direct enemy action, was professional and courageous. Captain Gilchrist's conduct has been of the highest order and in accordance with the finest traditions of the Australian Defence Force.

29. **Sergeant Street.** Sergeant Street was recommended for the Commendation for Distinguished Service by the 'J1/4 HQJOC', Colonel McManus on 25 October 2005.²⁹ The Tribunal notes that the nomination form has no identified Nominating Officer and was completed for the Queen's Birthday Honours list in 2006. During the hearing neither Colonel Davies or Commodore Ledger were able to recall processing or nominating Sergeant Street for the Commendation despite both being present when

²⁶ CDF/OUT/2005/1417 dated 23 September 2005

²⁷ Minister Assisting the Minister for Defence letter to the Governor-General dated 4 October 2005

²⁸ *Commonwealth of Australia Gazette* No. S199 dated 14 November 2005

²⁹ Nomination for Honours and Awards (AD-104) – Street dated 25 October 2005

Sergeant Street completed his tour. Commander Kelly also had no recollection of being consulted or asked about recognition for Sergeant Street although he had processed a nomination for the United States Army Commendation which was subsequently awarded.

30. The Commendation for Distinguished Service nomination was recommended by DCJOPS on 26 October 2005 and considered by the Army Honours and Awards Committee with other nominees for both operational and non-operational awards on 9 December 2005. The narrative supporting the citation outlines the background to Sergeant Street's duties and responsibilities. Excerpts from the narrative include the following:

... Sergeant Street served as a member of CEXC's ground team collecting intelligence from exploited scenes, overall participating in over 100 exploitations. Whilst participating in these missions Sergeant Street was under constant threat of enemy contact, often drawing direct and indirect enemy fire, in order to gather technical intelligence in support of the counter IED fight.

...Sergeant Street compiled and produced intelligence products, not only to personnel within CEXC, but to senior officers up to three stars. ... Throughout the entire deployment Sergeant Street demonstrated a superb analytical capability and a thorough knowledge of terrorist IED attacks and tactics.

Sergeant Street was directly responsible for the development of over forty intelligence and analytical products, and was instrumental in identifying and assessing the ever-shifting enemy intent and capabilities. These products were utilised to rapidly disseminate vital force protection issues to coalition forces. Sergeant Street demonstrated a positive and professional example at all times, he had the ability to motivate subordinates and peers alike to meet the daily challenges encountered during this tour ...

31. The CA endorsed Sergeant Street's nomination for the Commendation for Distinguished Service on 12 December 2005 and it was announced in June 2006.³⁰ The citation for the Commendation states:

For distinguished performance of duty as the Combined Explosive Exploitation Cell Intelligence Analyst during Operation CATALYST.

Sergeant Street's contribution to the technical exploitation of over 800 enemy devices was instrumental in identifying and assessing the ever-shifting enemy's intent and capabilities. The intelligence gathered through his technical knowledge was utilised to rapidly disseminate vital force protection issues to coalition forces.³¹

The Applicants' Submissions

32. **Street on Behalf of Gilchrist.** On 2 August 2011 the Tribunal received a document from Sergeant Street titled 'Nomination for an Australian Bravery

³⁰ Brief for CA on Queen's Birthday 2006 Nominations dated 9 December 2005

³¹ Citation for the Commendation for Distinguished Service, Street

Decoration' for Captain Gilchrist.³² The document included a 'citation for Captain Gilchrist' and listed a number of eyewitnesses and referees. The two and a half page 'citation' described the incident on 24 July 2005 in the Al Bayaa district near Baghdad when a United States National Guard vehicle was destroyed by an IED and four personnel killed.³³ The document described the response by the CEXC including the serious wounding of Captain Norton of the British Army by a secondary device. Norton was subsequently awarded the George Cross for his actions.³⁴ Sergeant Street's 'citation' then describes the further response to the incident on the following day (25 July 2005) to conduct post blast investigation of the two explosions by the team commanded by Captain Gilchrist.

33. The document states that 'an element of the EOD battalion was on scene and conducted a remote clearance of the site' after which the site was declared safe and handed over to Captain Gilchrist for exploitation. The document indicates that during the conduct of the post blast investigation, 'remnants of a simple pressure plate were discovered, intelligence ... indicated ... this particular type of pressure plate was usually laid in pairs targeting first responders'. Captain Gilchrist then ordered the withdrawal of the CEXC and personally conducted a 'fingertip' search of the immediate area. During this search, he discovered a tertiary device and withdrew, allowing the device to be rendered safe remotely by the EOD team. Sergeant Street states that:

Captain Gilchrist's prescience and clear orders in the most difficult circumstances undoubtedly prevented further injuries and loss of life.

34. Sergeant Street's 'citation' then describes a number of incidents involving Captain Gilchrist:

a. 9 March 2005 – post blast analysis of a suspected vehicle borne IED where 'without thought to ... own personal safety Captain Gilchrist ... conducted the clearance of the suspect vehicle';

b. 14 March 2005 – during a raid on a suspected bomb cache ... two pushbikes rigged as IEDs were discovered and 'without thought for his own personal safety Captain Gilchrist rendered one of the pushbike devices safe by hand';

c. 30 April 2005 – Captain Gilchrist was investigating another scene 'when the team was attacked by rocket propelled grenades. Despite the attack he still managed to conduct the necessary post blast analysis';

d. 9 May 2005 – whilst exploiting 'a supposedly rendered safe suicide vest' Captain Gilchrist discovered that the detonators were still connected 'without thought to his own personal safety he rendered the device safe by hand'; and

³² Nomination for an Australian Bravery Decoration from Sergeant Street on behalf of Captain Gilchrist received on 2 August 2011

³³ Citation for Captain Anthony Gilchrist

³⁴ The London Gazette Number 57935 of Thursday 23 March 2006 Supplement No.1

e. 31 July 2005 – Captain Gilchrist was dispatched to a nearly identical scene to the 25 July incident involving a vehicle and the death of four soldiers. ‘Captain Gilchrist conducted the clearance of the scene fully understanding the potential hazards to him ...’.

35. Sergeant Street concludes his ‘citation’ by stating:

On numerous other occasions Captain Gilchrist’s quick and instinctive thinking contributed to saving further loss of life to Coalition Forces. Captain Gilchrist, DSM has come under fire and has been exposed to significant danger on a number of occasions. He has consistently behaved in an exemplary fashion and his professionalism has been of the highest order. Captain Gilchrist’s outstanding bravery and conspicuous courage in circumstances of extreme peril, in particular the incident at Al Bayaa, and on a daily basis throughout his tour fully justifies formal recognition.

36. The application for review also included supporting statements from two previous CEXC Commanders, Gaghan and Kelly and a statement from Air Marshal Evans and Captain Norton. Commander Gaghan, USN commanded the CEXC until May 2005. His statement emphasizes Captain Gilchrist’s ‘tactical proficiency and exemplary leadership, high levels of professionalism’ and ‘courage under fire’.³⁵ He states:

Captain Gilchrist regularly deployed, with minimum security, to high threat areas under the constant threat of enemy contact, often drawing direct and indirect fire ... to collect tactical information and forensic evidence from post blast investigations ... I have relied upon Captain Gilchrist’s exemplary leadership and mature judgment ...

37. Commander Kelly stated that ‘... I was witness to, on numerous occasions ... acts of bravery and courage in circumstances of extreme peril that I would consider worthy of recognition from the [Australian] Government’.³⁶ He confirms the high operational tempo of the unit in 2005 and said that:

[Captain Gilchrist and Sergeant Street] knowingly, willingly, placed themselves in harm’s way to gather the most realistic and relevant tactical information and intelligence ... they [Gilchrist and Street] faced direct and indirect enemy fire on numerous occasions ... displayed uncommon courage, dedication and bravery ... behaved in an exemplary fashion ...

38. Commander Kelly also nominated Captain Gilchrist for the United States Bronze Star Medal for ‘exceptionally meritorious conduct’. During the hearing, Commander Kelly said that he did not nominate Captain Gilchrist for a higher award such as the Silver Star or the Bronze Star with Valour Device as the processing of these by higher authority ‘was not always fair’. He said that he was concerned that if the nomination failed, Captain Gilchrist would be left with nothing.

³⁵ Word Picture Captain Gilchrist by CDR F.E. Gaghan, USN, Commander CEXC-Iraq

³⁶ Letter from Commander Kelly, USN, Commander CEXC-Iraq

39. Air Vice Marshal Evans' statement of support indicated that Captain Gilchrist was under his National Command until May 2005.³⁷ He stated that:

the DSM was significant and thoroughly deserved

but that he believed that Captain Gilchrist:

deserved recognition for bravery in defusing multiple IEDs over an extended period ... under conditions of great strain and peril.

40. In addition to details of previous gallantry awards, Sergeant Street's application included comparisons of previous awards of the DSM to other service personnel and decisions by the Tribunal – implying that many of these were not for acts of bravery and that in his view, this demonstrated both the inappropriateness of the award to Captain Gilchrist and the precedent necessary to change the decision from distinguished service to a gallantry award.³⁸ He also attached media statements and press clippings to support his assertion that Captain Gilchrist should be recognised for his bravery and 'anecdotal' information he had compiled regarding the deployment and operations of the CEXC.

41. Two of Captain Gilchrist's team members from the CEXC, ATF Agent Chisholm and FBI Agent Hartman provided supporting statements on 23 May 2017. Agent Chisholm's statement outlined the incident on 24 July 2005 and then discussed the follow-up search on 25 July 2005.³⁹ The evidence confirmed that a 'simple pressure plate was discovered and that when it was realised that there was a possible tertiary device, Captain Gilchrist ordered the withdrawal of the team and then conducted a fingertip search'. Agent Chisholm said:

I observed Captain Gilchrist locate a tertiary device and watched as he rendered it safe ... Captain Gilchrist's gallant actions that day, evacuating personnel out of the kill radius, locating and rendering safe the tertiary device undoubtedly saved numerous lives.

42. Agent Hartman's evidence outlined Captain Gilchrist's involvement in incidents on 29 February, 14 March and 2 April 2005.⁴⁰ He said:

a. *29 February 2005 – ... Captain Gilchrist along with other members of the CEXC undertook an arduous and dangerous five hour move to Al Hillah ... Captain Gilchrist collected valuable intelligence ... and had to maintain a constant state of alertness ...*

b. *14 March 2005 – Agent Hartman describes the background to and conduct of the exploitation of pushbike IEDs mentioned previously by Sergeant Street. He states that Captain Gilchrist carried out this task without hesitation or regard for personal safety.*

³⁷ Statement by Air Vice Marshal G. Evans, National Commander JTF633

³⁸ Sergeant Street Application for Review of Decisions dated November 2015 – Attachment 4 – Folio and Attachment 9

³⁹ Statement by Agent K. Chisholm dated 23 May 2017

⁴⁰ Statement by Agent Hartman dated 29 May 2017

c. 2 April 2005 – Agent Hartman states that when responding to a post attack at Abu Ghraib prison, Captain Gilchrist's actions in alerting personnel to the possibility of mines 'ultimately saved' his life.

43. Agent Hartman concludes that Captain Gilchrist's 'outstanding bravery and courage in the face of enemy fire and extreme peril is a credit to the organisation and the country'.

44. During the hearing Sergeant Street asserted that he had witnessed numerous acts of bravery during his British Army service in Northern Ireland and that he had studied various awards for service. He opined that the level of threat in Iraq surpassed other theatres and that the operational tempo was extreme. He said that in his view the six incidents in the citation he provided demonstrated collectively that Captain Gilchrist should receive the SG. He said that the discovery of the tertiary device on 25 July 2005 by Captain Gilchrist was 'heroic' as he had no protective equipment and had ordered the rest of his team to withdraw.

45. Sergeant Street said Captain Gilchrist's actions were conspicuous and above and beyond what was normally required. He pointed out that the CEXC and weapons intelligence gathering was a new concept and line of operation for the Australian Defence Force and that they had little idea what they (the CEXC, including Gilchrist and Street) were doing when they arrived in country. This was corroborated by Commander Kelly and Air Vice Marshal Evans in their evidence.

46. Captain Gilchrist in his oral evidence confirmed that the team was new and that he had been told prior to departure that they were deploying to Iraq to 'learn as much as possible'. He said he had very limited training in post blast analysis and counter IED work and certainly no exposure to the traumatic environment that would become typical of post blast incidents involving death and injury. He stated that it was not the mandate for the CEXC to render safe devices as they were not equipped to do so. He said that if an IED or unexploded ordnance was discovered during exploitation, they would normally 'fall back' and call upon EOD to deal with the material.

47. Captain Gilchrist said the CEXC was 'the most dangerous thing' he was ever involved in and every time he went out he 'did not expect to return'. He said that he was 'under an horrendous amount of pressure' more so because he also inherited a leadership role which in his view was critical. He said that no-one on the team wanted to go out and that everyone was scared. He said that the most important thing for him was command and leadership and accordingly, he 'put on a brave face' and encouraged his people to do what was expected of them despite the danger. He said that ultimately the experience 'destroyed me' and 'I came home and got out'. He said he maintains a feeling of guilt because he made people go out and 'be exposed to danger every day'.

48. In relation to the incident on 25 July 2005 Captain Gilchrist said that in hindsight, the decision to conduct the search for the tertiary device was a 'poor decision'. He said that he had 'lost faith in the EOD teams' and decided to 'do this myself so it's done properly'. He said that he deduced where the pressure plate would

be after discovering a cord and once he had cut the cord, he extracted himself and the device was then rendered safe remotely by the EOD.

49. Captain Gilchrist concluded his evidence by stating that he did not believe he deserved recognition but that the team should be recognised.

50. Sergeant Street said in closing that 'he had witnessed bravery and could recognise it'. He said that in his view Captain Gilchrist's actions 'were above and beyond expectations' and that he wanted it acknowledged, particularly in comparison to similar awards made for non-warlike service. He said that the fact that no-one had sought to consult with the chain of command or the nominees before making decisions to award the DSM was 'a case of maladministration' and that the 'fair result' would be for the Tribunal to find that a gallantry award was appropriate recognition.

51. **Gilchrist on Behalf of Street.** On 2 August 2011 the Tribunal received a submission from Captain Gilchrist titled 'Nomination for an Australian Bravery Decoration' for Sergeant Street.⁴¹ The document included a synopsis of Sergeant Street's actions, a copy of a recommendation for the United States Army Commendation, a referee report, pictures and a list of eyewitnesses and referees. The submission described the incident on 24 July 2005 when a United States National Guard vehicle was destroyed by an IED and four personnel killed.⁴² The document described the response by the CEXC including the serious wounding of Captain Norton of the British Army by a secondary device. Captain Gilchrist then described the further response to the incident on the following day (25 July 2005) to conduct post blast investigation of the two explosions and Sergeant Street's involvement as the 'intelligence operator for the task'.

52. The document states that 'an element of the EOD battalion was on scene and conducted a remote clearance of the site' after which the site was declared safe and handed over to him for exploitation. He stated that Sergeant Street 'went forward ... knowing that the possibility still existed for further attacks, under cover of elements of B Company ...'. He stated that Sergeant Street was tasked to gather human intelligence from witnesses and that he 'gleaned new and vital intelligence' - the potential for the existence of a tertiary device. Captain Gilchrist said that Sergeant Street then withdrew 'with complete understanding of the potential hazard to himself'.

53. Captain Gilchrist stated that:

Sergeant Street's prescience and clear thinking in the most difficult circumstances undoubtedly prevented further injuries and potential loss of life.

54. Captain Gilchrist then described four additional incidents where he claims that Sergeant Street's actions 'warrant specific mention':

⁴¹ Submission to the Valour Inquiry from Captain Gilchrist on behalf of Sergeant Street dated 3 August 2011

⁴² Ibid.

- a. 14 March 2005 – during a raid on a suspected bomb cache, two pushbikes rigged as IEDs were discovered and Sergeant Street ‘assisted in the loading of the pushbikes’ into a vehicle under the direction of the attending ATO ‘despite the knowledge that the devices may have contained additional victim initiated triggers’;
- b. 30 April 2005 – ‘team was investigating another scene when the team was attacked by rocket propelled grenades. Despite the attack Sergeant Street managed to conduct the necessary post blast analysis ...’;
- c. 23 June 2005 – during exploitation at the scene of an IED ‘Sergeant Street observed a potential VBIED approaching the cordon at speed. He then proceeded to direct the attending US security elements towards the threat and ensured the vehicle was engaged with appropriate warning shots’; and
- d. 31 July 2005 – Sergeant Street was dispatched to a nearly identical scene to the 25 July incident involving a vehicle and the death of four soldiers. ‘Sergeant Street conducted the clearance of the scene fully understanding the potential hazard to him ...’.

55. Captain Gilchrist concludes his submission by stating:

On numerous other occasions Sergeant Street’s quick and instinctive thinking contributed to saving further loss of life to Coalition Forces. Sergeant Street has come under fire and has been exposed to significant danger on a number of occasions. He has consistently behaved in an exemplary fashion and his professionalism has been of the highest order. Sergeant Street’s outstanding bravery and courage in circumstances of extreme peril, in particular the incident in Al Bayaa, and on a daily basis throughout his tour fully justifies formal recognition.

56. The submission and subsequent application for review also included a supporting statement from FBI Agent John Perren, the FBI ‘on-scene commander’.⁴³ This statement dated 15 April 2005 commends Sergeant Street for his:

‘expertise in gathering intelligence’, his work ethic and his leadership

57. In his application for review of decision dated November 2015, Captain Gilchrist included a further incident involving Sergeant Street that he wished to be considered by the Tribunal:⁴⁴

29 February 2005 ... Sergeant Street along with other members of the CEXC undertook an arduous and dangerous five hour move to Al Hillah ... despite his concerns of armed men being seen around the area, including those with RPG weapons on rooftops overlooking the scene, Sergeant Street collected

⁴³ Letter of Recognition for Sergeant Street by FBI Agent Perren dated 15 April 2005

⁴⁴ This incident had not been mentioned in the 2 August 2011 ‘Nomination for an Australian Bravery Decoration’.

valuable intelligence from the site of the deadliest single insurgent attack in Iraq to date.

58. Captain Gilchrist also referred to this incident when he wrote to the Tribunal on 17 May 2017 seeking to have various witnesses provide evidence at the hearing.⁴⁵

59. In his application for review Captain Gilchrist provided additional material including statements from Commander Kelly, Air Vice Marshal Evans and Captain Norton.⁴⁶ Commander Kelly stated that ‘... I was witness to, on numerous occasions ... acts of bravery and courage in circumstances of extreme peril that I would consider worthy of recognition from the [Australian] Government’.⁴⁷ He confirmed the high operational tempo of the unit in 2005 and stated that:

[Sergeant Street and Captain Gilchrist] knowingly, willingly, placed themselves in harm’s way to gather the most realistic and relevant tactical information and intelligence ... they [Street and Gilchrist] faced direct and indirect enemy fire on numerous occasions ... displayed uncommon courage, dedication and bravery ... behaved in an exemplary fashion ...

60. Air Vice Marshal Evans’ statement of support indicated that Sergeant Street was under his National Command until May 2005.⁴⁸ He stated that:

the Commendation for Distinguished Service was significant and thoroughly deserved

but that he believed that Sergeant Street:

deserved recognition for bravery in defusing multiple IEDs over an extended period ... under conditions of great strain and peril.

61. Captain Norton’s contribution in support of the application was a letter dated 9 June 2009 and amplified in subsequent short notes to the Applicants.⁴⁹ Captain Norton claimed that he had on numerous occasions witnessed both men ‘perform acts of bravery worthy of award’ but he provided no specific examples.

62. In addition to details of previous gallantry awards, Captain Gilchrist’s request for review also included comparisons of prior awards for distinguished service to other personnel and decisions by the Tribunal. He implied that many of these were not for acts of bravery and that this demonstrated the inappropriateness of the award to Sergeant Street, and the precedent necessary to change the decision from distinguished service to a gallantry award.⁵⁰ He also attached media statements and press clippings to support his assertion that Sergeant Street should be recognised for

⁴⁵ Letter from Captain Gilchrist to the Tribunal dated 17 May 2017

⁴⁶ Application for Review of Decision letter dated November 2015

⁴⁷ Letter from Commander Kelly, USN, Commander CEXC-Iraq

⁴⁸ Statement by Air Vice Marshal G. Evans, National Commander JTF633

⁴⁹ Letter from Captain Norton, GC dated 9 June 2009

⁵⁰ Sergeant Street Application for Review of Decisions dated November 2015 – Attachment 4 and Attachment 9

his bravery and ‘anecdotal’ information he had compiled regarding the deployment and operations of the CEXC.

63. Significantly, one attachment to the application is what appears to be a draft of a nomination for the Chief of Defence Force Commendation for Sergeant Street dated August 2005.⁵¹ The draft commends Sergeant Street for his ‘tireless and exemplary performance as the Intelligence Analyst’ in the CEXC. The Tribunal notes that the wording in the draft is substantially the same as that used in Sergeant Street’s Commendation for Distinguished Service citation and narrative.

64. Two of Sergeant Street’s colleagues from the CEXC, ATF Agent Chisholm and FBI Agent Hartman provided supporting statements on 23 May 2017. Agent Chisholm’s statement outlined the incident on 24 July 2005 and then discussed the follow-up search on 25 July 2005.⁵² He said that:

I saw Sergeant Street interviewing members of a US Army EOD team ... were it not for Sergeant Street’s clear headed thinking and forethought to interview the EOD we would have suffered additional casualties ...

On each of more than 50 post blast scenes that Sergeant Street and I worked together I observed him fingerprint the severed hands and limbs of suicide bombers and victims in an effort to further identify remains. He carefully interviewed eyewitnesses and provided needed intelligence to our unit.

65. Agent Hartman’s evidence outlined Sergeant Street’s involvement in incidents on 29 February and 14 March 2005.⁵³ He said:

a. *29 February 2005 – ... CEXC undertook an arduous and dangerous five hour move to Al Hillah ... while e-route Sergeant Street (who was often our top gunner) had to maintain a constant state of alertness ...; and*

b. *14 March 2005 – ... Sergeant Street carried out this task [exploitation of pushbike IEDs] without hesitation or regard for personal safety.*

66. Agent Hartman concludes that Sergeant Street’s ‘outstanding bravery and courage in the face of enemy fire and extreme peril is a credit to the organisation and the country.

67. During the hearing Captain Gilchrist said that in his view Sergeant Street was worthy of a gallantry award although he conceded that ‘people’s recollections could be clouded with the passage of time’.

The Defence Submissions

68. **Recognition for Captain Gilchrist.** The Defence position in regard to recognition for Captain Gilchrist was provided in a Submission from DGPERS-A in

⁵¹ Draft CDF Commendation – Sergeant Street dated August 2005

⁵² Statement by Agent K. Chisholm dated 23 May 2017

⁵³ Statement by Agent Hartman dated 29 May 2017

February 2016.⁵⁴ Army indicated that it had applied the guidelines used in the Valour Inquiry and in the absence of maladministration or compelling new evidence had recommended that the submission not be passed to the Tribunal for review and that the award had been appropriately considered by the chain of command at the time.

69. In response to questions from the Tribunal, Army provided additional information in December 2016.⁵⁵ This information included briefing papers on the development of Ministerial advice in relation to Captain Gilchrist and the chain of recommendation for his award. The response indicated that:

*The records reviewed to date indicate that Captain Gilchrist was awarded for his overall distinguished service with the incident of 24-25 July 2005 used as a specific example*⁵⁶

70. The response clarified that it was possible for an individual to receive two separate awards during the same tour 'provided the cited service is different for each award'. Attached to the response were a number of classified documents including daily Situation Reports and Exploitation reports which the Tribunal reviewed before passing sanitised versions to the Applicants.

71. The assessment by Army of Sergeant Street's claims indicated that:

... the submission does not mention that Captain Gilchrist received a DSM for his many actions ...

... a significant portion of the account of action contained within the submission is identical to the submission seeking an award for Sergeant Street ...

... the submission does not state why the award is sought ...

... the nomination was processed in accordance with accepted practice at the time ...

... the Commanding Officer nominated Captain Gilchrist for his actions over the entire period of his deployment, not a single event ...

72. **Recognition for Sergeant Street.** On 2 May 2017 the Directorate provided a response to the Tribunal regarding recognition for Sergeant Street.⁵⁷ Army indicated that it had applied the guidelines used in the Valour Inquiry and in the absence of maladministration or compelling new evidence had recommended that the submission not be passed to the Tribunal for review and that the award had been appropriately considered by the chain of command at the time. The reasons were substantially the same as those given previously in relation to Captain Gilchrist.

⁵⁴ DGPERS-A/OUT/2016/R24807323 dated 14 February 2016

⁵⁵ Undated Letter from DGPERS-A to the Tribunal

⁵⁶ Ibid. P.2.(e)

⁵⁷ DH&A/OUT/2016/0087 dated 2 May 2017

73. The response also included newly discovered material sourced from JOC which indicated that in February 2009, Captain Gilchrist and Sergeant Street had submitted nominations for bravery decorations to the ABDC in relation to each other's actions on 25 July 2005 and in other incidents. In response to a comprehensive set of briefing notes and recommendations, the CJOPS made a decision regarding recognition of both individuals.⁵⁸ Drawing on his experience as a previous Commander JTF633 and having been involved in the original planning for the CEXC when he was the DCJOPS, General Evans wrote:

... I have not agreed the recommendation of offering a Medal of Gallantry and a Commendation of Gallantry to Messrs Gilchrist and Street respectively.

...

I am well aware of the tremendous work done by our people in this organisation. I recognise that this work requires sustained courage by all concerned and I have been inspired by their actions. Indeed, I have been the recommending officer for awards for people in CEXC.

In coming to my decision to not: replace their current awards; or provide additional awards; I considered the following:

I place great weight on the high value of the awards that have been given. To achieve either the DSM or the Commendation for Distinguished Service is recognition of the considerable measure for actions of the recipient. Many courageous service personnel fail to achieve that level of recognition.

I place great weight on the fact that the matters raised would have been considered by the recommending and approving officers at the time. I am disinclined to override the decisions made by these people.

...

In essence, I consider both men did a great job and were appropriately recognised at the time for their contribution, their leadership and their courage.

74. At the hearing, Defence indicated that their position in relation to the Applicants' claims was as stated by General Evans in 2009 and whilst Army and JOC acknowledged the Applicants' work in 2005, they stated that the decision made by General Evans was extant. The Tribunal noted that the Applicants did not accept this position and that their questioning of witnesses implied that they expected that they and others should have been consulted by the chain of command before recommendations and decisions were made.

Tribunal Consideration

75. **General.** The Tribunal is required to review decisions 'on the merits'. This requires an examination of the merits of the matter in dispute rather than the

⁵⁸ CJOPS Letter to J1/4 dated 9 August 2009

lawfulness of the decision under review.⁵⁹ The merits review revolves around the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the decision-maker.

76. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.⁶⁰ 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.⁶¹ The Tribunal is bound to make what it regards as the ‘correct or preferable’ decision and must reach a decision that is legally and factually correct.

77. **The Reviewable Decisions.** The Tribunal noted that the reviewable decisions were made by the CA on 27 April 2015. At the time, the CA noted that the Applicants had not identified that they had both been recognised and did not specify the awards they were seeking. The Tribunal noted that the basis of the decisions by the CA was a finding that there was no maladministration in the processing of the Applicants’ distinguished service awards in 2005/2006. The CA also considered that the distinguished service awards recognised the Applicants’ respective roles in collection and exploitation of intelligence and were awarded for their entire tour of duty not just a specific incident.

78. The Tribunal was satisfied that the recommendations by the CA were actions open to him to make and were made in response to requests for review by the Minister.

79. **The Defence Submission.** The Tribunal noted that no merits review of the Applicants’ claims was completed by Army and that whilst the CA did note the issue of recognition through distinguished service awards, the conclusion that the awards were appropriate did not appear to have been examined in any depth.

80. The Tribunal noted the 2009 consideration of the matter by CJOPS. The Tribunal considered that General Evans’ reasons for decision were lucid and logical and that his experience in these matters was considerable. His explanation that distinguished service awards were ‘considerable recognition’ and that the recommending and approving officer’s determinations should ‘not be overridden’ were in the Tribunal’s view, a reasonable position to take.

81. Most importantly, the Tribunal gave great weight to General Evans’ conclusion that he considered that:

both men did a great job and were appropriately recognised at the time for their contribution, their leadership and their courage.

82. The Tribunal noted the Applicants’ assertion that there should have been consultation with the chain of command and witnesses before decisions were reached about levels of award by General Evans. However, in the absence of policy requiring

⁵⁹ Council of Australian Tribunals Practice Manual dated 7 April 2006 p.1.3.1.2

⁶⁰ Pearson, Linda, “Merit Review Tribunals”, in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68

⁶¹ *McDonald v Director-General of Social Security* (1984) 1 FCR 354

this action, the Tribunal disagreed with the assertion. Nominations rely upon the citation and narrative, supported where necessary by witness statements. At any time in the process a recommending officer may exercise discretion to change or refuse a nomination.

83. The Tribunal noted the claim by Defence at the hearing that this ‘policy’ is currently under review however it has no bearing on this matter and in any case, the legislation requires the Tribunal to conduct a merits review.

84. **Precedent and Comparisons.** The Tribunal noted the Applicants’ various assertions regarding precedent and comparisons to ‘similar’ actions which resulted in high level gallantry awards. The Tribunal did not accept that comparisons were a valid method of establishing the benchmark for a particular award. Furthermore, the Tribunal considered that the Applicants’ attempts to compare other distinguished service recipients’ actions to those of their own, despite considerable differences in environment, operation and performance, to be misguided and erroneous.

85. Similarly, the Tribunal did not accept that precedent was a justifiable factor in determining eligibility for defence honours and awards. Eligibility is determined by the conditions as declared in the Instruments, Regulations and Determinations for each particular honour or award and is determined in each matter according to its own facts. In the case of gallantry, decisions to grant awards are discretionary. The Tribunal therefore dismissed the Applicants’ claims regarding precedent, as the Tribunal has an obligation to determine eligibility based on the merits of each case.

86. **Reliability of the Applicants’ Evidence.** The Tribunal noted that in the Applicants’ original submissions they did not identify that they had previously made similar applications which had been considered and rejected by JOC in 2009. The Tribunal also noted that the Applicants’ submissions and evidence were produced in almost identical terms. Army stated in their deliberations that:

a significant portion of the account of action contained within the submission [by Captain Gilchrist] is identical to the submission by Sergeant Street ...

87. The Tribunal also noted that during the hearing, Sergeant Street in response to questions about the source of evidence and material in his draft ‘citation’ stated that he had copied material from previously approved bravery awards including that of Captain Norton. The Tribunal did not consider that there was any intent to deceive, however the reliability of the evidence was questionable and in some cases in error.

88. **Australian Honours for Distinguished Service.** The Distinguished Service Cross (DSC), the DSM and the Commendation for Distinguished Service were established by Letters Patent on 15 January 1991 for the purpose of recognising members of the Defence Force and certain other persons for:

distinguished command and leadership in action or distinguished leadership in action or distinguished performance of duties in warlike operations⁶²

⁶² Commonwealth of Australia Gazette No. S25 – Distinguished Service Decorations Regulations - dated 4 February 1991

89. Distinguished service awards are governed by Regulations set out in the Schedule:

...

Conditions for award of the decorations

3. (1) *The Distinguished Service Cross shall be awarded only for distinguished command and leadership in action.*

(2) *The Distinguished Service Medal shall be awarded only for distinguished leadership in action.*

(3) *The Commendation for Distinguished Service shall be awarded only for distinguished performance of duties in warlike operations.*⁶³

4. *Each decoration may be awarded posthumously.*

...

Making of awards

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

...

90. **Was Captain Gilchrist's Distinguished Service Award Appropriate?** The Tribunal noted that the Applicants claimed that their respective distinguished service awards were 'inappropriate'. The Tribunal reviewed these claims in light of the evidence provided and made the following observations:

a. **Process.** The process used in Iraq in 2005 to consider individuals for recognition at the time of Captain Gilchrist's nomination was in the Tribunal's view, impromptu. The Commander stated that he had delegated responsibility to his Chief of Staff who in turn stated that there was no identified process in the Joint Task Force (JTF) headquarters, preferring to 'consider individuals as they closed on departure'. The Tribunal found that the lack of a process had the potential to undermine and disrupt the honours and awards system and made the system inconsistent and difficult to review.

b. **Understanding of Honours and Awards.** The Tribunal formed the view that the officers involved in Captain Gilchrist's nomination in theatre had a limited understanding of the concept of distinguished service and the relationship to gallantry. The Tribunal also noted that the headquarters was not a formed body and did not have the benefit of being trained or prepared as a group prior to deployment. Colonel Davies stated that he was focussed on Captain Gilchrist's leadership and service during the deployment which he said was more apparent to him than gallantry. He said that he had had little involvement in honours and awards prior to his appointment as the Chief of Staff. Having discussed the reasons for the immediacy of the award, the Tribunal concluded that there was no valid reason to process the nomination as an 'immediate' recommendation and that the continuation of the nomination

⁶³ The Tribunal notes that *Commonwealth of Australia Gazette No. S18* dated 22 February 2012 amended the term 'in action' to 'in warlike operations'.

as an immediate award, in hindsight, should have been questioned at the various levels of recommendation above theatre. The Tribunal also noted that the draft letter prepared by Defence for the Minister indicated that Captain Gilchrist's nomination was for 'specifically one act of dedication, courage and professionalism ...'.⁶⁴ This statement in the view of the Tribunal, was a misinterpretation of the narrative for the action which stated that the incident 'illustrated' Captain Gilchrist's dedication, courage and professionalism. The Tribunal found that there was a lack of understanding and inexperience in dealing with honours and awards in the JTF headquarters, exacerbated by the lack of a process and compounded by progressing the nomination as an immediate award.

c. **Foreign Nominators.** The Tribunal noted that Colonel Davies said that in drafting the nomination for Captain Gilchrist he had consulted with Gilchrist's Commanding Officer – Commander Kelly and also discussed the matter with the JOC. Commander Kelly did not recall being consulted or signing the nomination. Commander Kelly was also unaware of the Australian system. Based on the evidence presented, the Tribunal concluded that in all likelihood Commander Kelly signed the nomination form placed before him with no understanding at the time as to what it meant. The Tribunal was of the view that using foreigners to propose or nominate Australian awards was a practice that should where possible be avoided.

d. **Knowledge of the Nominee's Role.** Having heard the evidence of various witnesses in the Australian command chain, the Tribunal formed the view that there was a lack of understanding of the role of the CEXC. At hearing it was apparent that both Air Vice Marshal Evans and Colonel Davies were clearly of the view that the primary role of the unit at the time was the disposal or defusing of devices followed by exploitation. The evidence was that this was not the unit's role – the focus was on exploitation of devices not disposal. The Tribunal considered that this lack of understanding was instrumental in the Australian chain of command seeking recognition based on a perception of bravery when in fact the very nature of the unit role arguably pointed towards recognition for individual service not gallantry.

e. **Leadership.** The Tribunal noted that all witnesses conceded that Captain Gilchrist had a fundamental role in leading his team and all declared that they were aware that he had done this to a distinguished level over the duration of the deployment. Captain Gilchrist's own evidence emphasised his leadership role. The many citations, commendations and certificates of appreciation accentuated Captain Gilchrist's leadership. Based on this evidence, the Tribunal considered that Captain Gilchrist's leadership of his team during the deployment was exemplary.

91. **Appropriateness.** The Tribunal noted that the DSM is awarded only for *distinguished leadership in action*. The DSC is differentiated by the requirement for command and the Commendation is for performance of duties. The Tribunal was therefore satisfied that the evidence before it points to Captain Gilchrist's

⁶⁴ Attachment 1 to CDF/OUT/2005/1417 to the Minister Assisting dated 23 September 2005

distinguished leadership in action in hazardous circumstances. Despite the processing and deliberations for the award being less than optimal, the level of award does reflect the eligibility criteria. The citation and narrative clearly support leadership and Captain Gilchrist's actions on 25 July 2005 are included as an 'illustration' of his 'dedication, courage and professionalism'. Accordingly, the Tribunal finds that the award of the DSM is appropriate.

92. **Was Sergeant Street's Distinguished Service Award Appropriate?** The Tribunal noted that the circumstances of Sergeant Street's award process was different to that of Captain Gilchrist. The Tribunal considered that similar deficiencies to those identified in the processing of Gilchrist's nomination as discussed above, were manifest in the Street nomination. The evidence to the Tribunal was that no one in the headquarters could recall nominating him for an award and the actual nomination form was unsigned.

a. **CDF Commendation.** The evidence of a draft 'CDF Commendation' which reads substantially the same as the citation for Sergeant Street's Commendation for Distinguished Service suggests that he was perhaps nominated for this lower level of award by the JTF headquarters. Further, the operational awards summary sheet presented to the CA for endorsement, lists Sergeant Street at the bottom of the redacted list, suggesting that if the list is in priority order, he may have been considered by the awards Board and upgraded from a CDF Commendation. The Tribunal found that on the balance of probabilities, Sergeant Street was nominated for a service commendation by JTF 633 which was upgraded to a Commendation for Distinguished Service by JOC after he returned from Iraq.

b. **Sergeant Street's Duties.** The Tribunal noted that Sergeant Street had a technical role in the CEXC and his duties centred on the gathering of intelligence, analysis and reporting. Witnesses complimented him on his thoroughness and the quantity and quality of his work as well as his professional example. He also performed duties which in the opinion of the Tribunal were expected of a senior non-commissioned officer such as coordinating security and protection. The evidence suggested that Sergeant Street consistently performed his duties to a high level and beyond what would normally be expected. The Tribunal noted that Sergeant Street's own evidence indicated that he had significant operational experience in the analysis of intelligence when serving for nine years with the British Army just prior to moving to Australia.

93. **Appropriateness.** The Tribunal noted that the Commendation for Distinguished Service is awarded only for *distinguished performance of duties in warlike operations*. The next higher award, the DSM has the requirement for leadership. Sergeant Street was not in a leadership position nor does the evidence suggest that he acted in an actual leadership role. The Tribunal was therefore satisfied that the evidence before it points to Sergeant Street's distinguished performance of his duties and therefore the Tribunal finds that the award is appropriate.

Assessing the Applicants Eligibility for Gallantry Awards

94. In conducting the merits review the Tribunal determined that it would review the evidence, Applicants' claims and submissions and then assess the actions of

Captain Gilchrist and Sergeant Street against the eligibility criteria for gallantry awards. Notwithstanding their stated claim that they should each be recognised by the award of the SG, the Tribunal considered that the necessary first step was to establish whether or not their individual actions during the tour of Iraq could be considered to be gallant. If this could be established, the Tribunal decided it would then move to an assessment of the level of award.

95. **Australian Honours for Gallantry.** The highest gallantry decoration is the Victoria Cross for Australia, for according recognition to persons who, in the presence of the enemy:

*‘perform acts of the most conspicuous gallantry, or daring or per-eminent acts of valour or self-sacrifice or display extreme devotion to duty’.*⁶⁵

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

*‘according recognition to members of the Defence Force and certain other persons who perform acts of gallantry in action.’*⁶⁶

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

...

Conditions for award of the decorations

3. (1) *The Star of Gallantry shall be awarded only for acts of great heroism or conspicuous gallantry in action in circumstances of great peril.*

(2) *The Medal for Gallantry shall be awarded only for acts of gallantry in action in hazardous circumstances.*

(3) *The Commendation for Gallantry may be awarded for other acts of gallantry in action which are considered worthy of recognition.*⁶⁷

4. *Each decoration may be awarded posthumously.*

...

Making of awards

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

...

98. **What is Gallantry?** The Tribunal noted that gallantry decorations accord recognition for individuals ‘who perform acts of gallantry in action’. Whilst ‘in action’ is relatively easy to define, ‘gallantry’ is an abstract term, which is not defined

⁶⁵ Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations - dated 4 February 1991

⁶⁶ Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations - dated 4 February 1991

⁶⁷ Letters Patent dated 17 October 1996 inserted 3A to allow for gallantry awards to be made if not in action if ‘it occurred in circumstances similar to armed combat or actual operations and the individual was under military command’.

in the Regulations. Various dictionary definitions such as ‘dashing courage; heroic bravery’⁶⁸; and ‘courageous behaviour, especially in battle’⁶⁹, are largely circuitous and unhelpful. Some countries have attempted to differentiate between ‘bravery’ and ‘gallantry’; defining the later as recognition of military personnel who carry out acts which put their lives at risk while involved in operational service; whilst ‘bravery’ is defined as saving or attempting to save the life of another person in the course of which they place their own life at risk.⁷⁰ Again this is largely unhelpful in defining gallantry in the context of the Australian Honours and Awards system.

99. The Tribunal considered that all soldiers who do their expected duty in battle or on operations are brave and that duty and bravery rely on each other. The Tribunal considered that ‘gallantry’ required a higher standard than bravery and usually, but not always, includes a special element of courage, fearlessness, daring or heroism.

100. The Tribunal considered that what amounts to ‘acts of gallantry’, necessarily, varies according to the individual circumstances of each action, and depending on many factors, including the level of threat, the risk to the individual and or the group, and the consequences of the particular act.

101. The Tribunal considered that the concept of gallantry is greater than collective or individual acts of bravery and above and beyond what was expected of an individual or group who were bravely doing what they were trained to do or expected to do as part of a role, rank or responsibility.

102. **The CEXC Role and Group Gallantry.** The Tribunal noted that the role of the CEXC was to investigate post blast and explosive incidents and gather information. Expert witnesses including Captain Gilchrist and Commander Kelly informed the Tribunal that the CEXC was not normally required to render safe devices unless it was ‘in extremis’. Rendering safe was normally done by an EOD team prior to the insertion of the CEXC. The Tribunal considered this to be a significant statement of fact and was not well understood by either the Australian chain of command or the public. Many witnesses and commentators had made the assumption that the CEXC were involved in ‘defusing multiple IEDs over an extended period’ when in fact they had not.⁷¹

103. Whilst there is no doubt that Captain Gilchrist and Sergeant Street attended several incidents, they were rarely the first responder. Additionally, Captain Gilchrist’s training ensured that if he was faced with an IED that had not been rendered safe, his normal response would have been to withdraw and call upon an EOD team unless there was a situation where life was immediately threatened. Commander Kelly emphasised this when he stated that if a device was discovered by the CEXC, their immediate response would normally be to ‘back out and call EOD’.

104. Additionally, the Tribunal noted that some commentators had mixed Captain Gilchrist’s role and Sergeant Street’s duties together to imply that both were required

⁶⁸ The Macquarie Dictionary on-line accessed 20 February 2017

⁶⁹ The Oxford Dictionary on-line accessed 20 February 2017

⁷⁰ <http://medals.nzdf.mil.nz/category/d/index.html>

⁷¹ Air Vice Marshal Evans Statement and oral evidence.

to deal with IEDs.⁷² This was not the case as Sergeant Street was not trained and would not have been asked to defuse or render safe a device.

105. The Tribunal accepted that there had been a significant increase in operational tempo for the CEXC in Iraq in 2005 as the IED became the weapon of choice for the enemy. This resulted in numerous horrific incidents targeted against Coalition and Iraqi forces as well as civilian targets. The Tribunal was of the view that the CEXC were not adequately prepared for the level of activity they were to encounter or how best to deal with the scenes they confronted on arrival at an incident. Although not the first responders, there was a continual risk that unexploded devices could still exist, and this was confirmed on at least one occasion. Their task of information gathering at the scene meant that they were required to conduct a detailed search of the area, collecting evidence and photographing items of relevance. This meant that horrific scenes of the impact of blast on victims were a regular occurrence.

106. Notwithstanding the horror of their employment, the threat and the inherent risk, the Tribunal formed the view that the CEXC as a group were actually doing what they were individually expected to do as part of their role and responsibility. That the performance of their duties required courage is not in question. Whether this courage could be considered to be gallant for the purpose of recognition requires an analysis of the cited actions in search of specific acts of gallantry.

107. **Evidence of Gallantry from the Accounts of Captain Gilchrist's Tour.** Several witness accounts and claims of involvement in incidents were tendered to the Tribunal regarding Captain Gilchrist's tour of duty. Having reviewed the evidence and submissions, the Tribunal was reasonably satisfied that the following facts are established relating to claims of gallantry:

- a. **Commander Kelly.** Commander Kelly stated that he was 'witness to, on numerous occasions, acts of bravery and courage in circumstances of extreme peril' and that Captain Gilchrist 'faced direct and indirect fire on numerous occasions'. During his oral evidence, Commander Kelly clarified that he was only actually witness to the events of 25 July 2005 and that he could only recall one instance of direct fire 'towards the end of the tour during a road move which involved small arms and a mortar'. Whilst Commander Kelly claims that Captain Gilchrist 'displayed uncommon courage', he was not able to provide specific examples of gallantry.
- b. **Commander Gaghan.** Commander Gaghan's statement provides no evidence of specific acts of gallantry and points to exemplary leadership and professional performance of duty. His statement that Captain Gilchrist regularly deployed '... often drawing direct and indirect fire ...' is not supported by the evidence.

⁷² <http://www.theage.com.au/national/hurt-locker-team-forgotten-20100309-pvwh.html>

- c. **Commodore Ledger.** Commodore Ledger was unaware of any specific acts of gallantry being drawn to his attention. He stated that in his view the DSM was the appropriate recognition for Captain Gilchrist.
- d. **Air Vice Marshal Evans.** Air Vice Marshal Evans was unaware of any specific acts of gallantry being drawn to his attention. In relation to whether he would have been aware of the Australian members of CEXC being fired upon he stated that he would have been and it would have been reflected in his daily Situation Reports. The Tribunal reviewed the reports and no instances of the CEXC being fired upon are recorded. Air Marshal Evans also indicated that at the time (2005) he was unaware that CEXC were not responsible for defusing IEDs.
- e. **Colonel Davies.** Colonel Davies stated that in his view there was insufficient evidence of gallantry and that the DSM was appropriate.
- f. **ATF Agent Chisholm.** Agent Chisholm's evidence was confined to the 25 July 2005 action. He confirmed that Captain Gilchrist conducted a fingertip search and rendered safe a tertiary device. He provided no examples of gallantry at other times, implying that the 25 July incident was courageous and saved lives.
- g. **FBI Agent Hartman.** Agent Hartman's evidence outlined Captain Gilchrist's involvement in incidents on 29 February, 14 March and 2 April 2005. He stated that Captain Gilchrist 'undertook an arduous and dangerous five-hour move, maintained a constant state of alertness and that he carried out his duties without hesitation or regard for personal safety'. He provided no specific examples of gallantry. Furthermore Captain Gilchrist was not involved in the 29 February incident.
- h. **Sergeant Street.** Sergeant Street's evidence does not point to specific acts of gallantry by Captain Gilchrist. Whilst he generally describes acts as 'heroic', he provides no actual evidence to support his claims. On the occasions that he cited as requiring devices to be 'rendered safe by hand', the context of the actions, whilst clearly hazardous and inherently dangerous were, in the view of the Tribunal, actions which were within the scope of Captain Gilchrist's training and responsibility. Further, the draft citation provided by Sergeant Street was unreliable as it was a compilation of other citations including Captain Norton. Accordingly, the Tribunal afforded it little weight in its deliberations.
- i. **Captain Gilchrist's Own Evidence.** Captain Gilchrist's evidence was compelling and highlighted the leadership pressure he was under throughout his tour. His response to this pressure in the view of the Tribunal pointed to an exemplary performance of his duties, particularly as a leader. His description of the events on 25 July 2005 and his statement that he had 'lost faith in the EOD teams' and decided to 'do this myself so it's done properly' – in the view of the Tribunal implied that he acted out of a sense of frustration. Whilst this in no way diminishes the courage of his actions, the Tribunal considered that his actions on 25 July 2005 were

within the scope of his training and he did what he felt was the correct thing to do on the day. The Tribunal did not consider this to be an act of gallantry, Captain Gilchrist was doing what he was trained to do and he had choices. Ultimately, the device was rendered safe by the EOD.

108. **Finding Regarding Acts of Gallantry by Captain Gilchrist.** The Tribunal having reviewed the material before it and having heard the witnesses, finds that there is insufficient evidence to support the claim that Captain Gilchrist performed specific acts of gallantry during his tour of duty with the CEXC in Iraq. The Tribunal felt that Sergeant Street's words best described Captain Gilchrist's performance of duty:

Captain Gilchrist's prescience and clear orders in the most difficult circumstances undoubtedly prevented further injuries and loss of life.

109. **Evidence of Gallantry from the Accounts of Sergeant Street's Tour.** Several witness accounts and claims of involvement in incidents were tendered to the Tribunal regarding Sergeant Street's tour of duty. Having reviewed the evidence and submissions, the Tribunal was reasonably satisfied that the following facts are established relating to claims of gallantry:

- a. **Commander Kelly.** Commander Kelly stated that he was 'witness to, on numerous occasions, acts of bravery and courage in circumstances of extreme peril' and that Sergeant Street 'faced direct and indirect fire on numerous occasions'. During his oral evidence, Commander Kelly clarified that he was only actually witness to the events of 25 July 2005 and that he could only recall one instance of direct fire 'towards the end of the tour during a road move which involved small arms and a mortar'. Whilst Commander Kelly claims that Sergeant Street 'displayed uncommon courage', he was not able to provide specific examples of gallantry but did acknowledge that Sergeant Street's intelligence gathering skills yielded success.
- b. **Air Vice Marshal Evans.** Air Vice Marshal Evans was unaware of any specific acts of gallantry being drawn to his attention. He also indicated that at the time he was unaware that CEXC were not responsible for defusing IEDs and during the hearing agreed that in any case, Sergeant Street was neither qualified or expected to 'defuse' devices.
- c. **ATF Agent Chisholm.** Agent Chisholm's evidence was confined to the 25 July 2005 action. He confirmed that Sergeant Street had been involved in interviewing witnesses and that the immediate evidence he gathered at the scene was critical information that he relayed to his superiors causing the withdrawal of the team. He provided no examples of gallantry, but did indicate that the team usually operated under the direct observation of insurgents and the tempo was high.
- d. **FBI Agent Hartman.** Agent Hartman's evidence outlined Sergeant Street's involvement in incidents on 29 February, 14 March and 2 April 2005. He described Sergeant Street's performance of duties as a 'top-

gunner' in hazardous situations, and courage in the handling of devices for exploitation. He provided no specific examples of gallantry.

- e. **FBI Agent Perren.** Agent Perren's statement commends Sergeant Street for his 'expertise in gathering intelligence', his work ethic and his leadership but makes no mention of acts of gallantry.
- f. **Captain Gilchrist.** Captain Gilchrist's evidence does not point to specific acts of gallantry by Sergeant Street. The incidents he has cited generally discuss Sergeant Street's skills in intelligence analysis and collection as well as his exemplary performance of duty in tasks normally expected of a senior non-commissioned officer such as initiative and security coordination. He also identified Sergeant Street's quick and instinctive thinking under threat.
- g. **Sergeant Street's Own Evidence.** Sergeant Street's own evidence was self-effacing and clearly focused on recognition for Captain Gilchrist, not himself. In the Tribunal's view, his support role to Captain Gilchrist throughout the tour was significant and to be expected from an experienced soldier. The Tribunal considered that the material suggested that Sergeant Street's performance was superior to his colleagues and he demonstrated exemplary trade skills in the collection of intelligence in extremely hazardous circumstances.

110. **Finding Regarding Acts of Gallantry by Sergeant Street.** The Tribunal having reviewed the material before it and having heard the witnesses, finds that there is insufficient evidence to support the claim that Sergeant Street performed acts of gallantry during his tour of duty with the CEXC in Iraq. The Tribunal felt that Captain Gilchrist's words best described Sergeant Street's performance of duty:

Sergeant Street's prescience and clear thinking in the most difficult circumstances undoubtedly prevented further injuries and potential loss of life.

Conclusion

111. The Tribunal reviewed the original claims and new material provided by the Applicants as well as hearing evidence from witnesses. The Tribunal formed the view that members of the CEXC including Captain Gilchrist and Sergeant Street, were placed into a situation which they were ill-equipped to handle and performed a role that was not well understood by their Australian superiors. Whilst their duties placed them into situations of extreme horror and inherent danger, contrary to many opinions, they were not actually required to routinely 'defuse devices'. Their role was to gather and exploit intelligence and they did this in an exemplary manner.

112. The Tribunal was satisfied that the distinguished service decorations provided to Captain Gilchrist and Sergeant Street for their tours of duty with the CEXC in Iraq in 2005 were appropriate. In the conduct of the merits review, the Tribunal gave significant weight to the fact that the CJOPS had personally reviewed the Applicant's claims in 2009 and had articulated his reasons for not changing the awards they had been given.

113. The Tribunal could find no specific evidence of gallantry but conceded that both Captain Gilchrist and Sergeant Street performed their duties bravely and with distinction – as was expected of them, and for which they were appropriately recognised.

114. For the reasons given above, the Tribunal finds that Captain Gilchrist and Sergeant Street’s actions during their tour of duty with the CEXC in Iraq in 2005 were appropriately recognised and that they did not meet the threshold for receipt of an Australian gallantry award. This finding does not in any way diminish the contribution they both made to their country and the Coalition during their service in Iraq.

TRIBUNAL DECISION

115. The Tribunal recommends to the Minister:

- a. that the decision by the Chief of Army to refuse to recommend a gallantry award for Captain Anthony Gilchrist, DSM for his actions during his tour of Iraq with the Combined Explosive Exploitation Cell in 2005 be affirmed; and
- b. that the decision by the Chief of Army to refuse to recommend a gallantry award for Sergeant Andrew Street for his actions during his tour of Iraq with the Combined Explosive Exploitation Cell in 2005 be affirmed.