



Australian Government

Defence Honours and Awards Appeals Tribunal

Carl Oatley and the Department of Defence [2014] DHAAT 11 (8 April 2014)

File Number 2012/020

Re **Carl Stephen Oatley**
 APPLICANT

And **Department of Defence**
 RESPONDENT

Tribunal Mr Alan Rose AO (Presiding Member)
 Brigadier Gary Bornholt AM, CSC (Retd)

Hearing Date 13 February 2013

DECISION

On 8 April 2014 the Tribunal decided to affirm the decision of the Department of Defence that Mr Carl Stephen Oatley is not eligible for the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.

CATCHWORDS

DEFENCE AWARD – the Australian Service Medal with Clasp 'SPECIAL OPS'

LEGISLATION

Defence Act 1903 – ss110T, 110V(1)(a)(ii), 110VA, 110VB(2)

Defence Force Regulations 1952 - reg 93C and Schd 3

Australian Service Medal Regulations 1988

Australian Service Medal Regulations 2001

Administrative Decisions (Judicial Review) Act 1977

REASONS FOR DECISION

Introduction

1. On 16 May 1988, civil disturbances in Vanuatu culminated in extensive rioting in the capital, Vila. The Australian Government was requested late that night, by the Prime Minister of Vanuatu, to urgently provide riot control equipment and material for the purpose of assisting the Vanuatu authorities in preventing further loss of life and property damage and to restore order. Since the request strongly emphasised the urgency of the situation, the Australian Government decided overnight to support the request. A Royal Australian Air Force (RAAF) Task G504 was authorised and a C130E aircraft departed from Canberra at 0620 on 17 May 1988 carrying standard police riot control material and equipment of the kind held by Australian police forces.¹ Also embarked on the aircraft were several RAAF Air Defence Guards (ADG). The aircraft transited via Williamstown and Brisbane before departing for Vila. After a very short period of time on the ground in Vila, the aircraft returned to Australia on 17 May 1988 having completed Task G504 without incident.

2. Twelve years later, Air Force Headquarters (AFHQ) sent a message to units calling for nominations describing operations that might be considered for recognition with the award of the Australian Service Medal with Clasp 'SPECIAL OPS' (ASM with Clasp 'SPECIAL OPS'). Ten assessment criteria, developed internally by AFHQ were included in the message. On 23 June 2000, Mr Carl Stephen Oatley (Mr Oatley), who at the time was a Wing Commander serving in the RAAF, made a submission to AFHQ in which he outlined in accordance with the assessment criteria, the service rendered by the RAAF crew of Task G504 on 17 May 1988. His submission sought medallic recognition for himself, an intelligence officer assigned for the task, and the crew of Task G504.

3. To ensure consideration by the chain of command, Mr Oatley's submission was sent by AFHQ to Commander Airlift Group (CDRALG) for review. On 21 February 2001, CDRALG advised the Department of Defence (Defence) that:

... I have reviewed the submission and commend the crew for their efforts in accomplishing this task. I cannot support the request nor can I justify recommending any further action other than to forward the request to your office for further consideration.

4. The Directorate of Honours and Awards (the Directorate) forwarded Mr Oatley's submission along with CDRALG's advice to AFHQ on 27 March 2001. In its covering minute, the Directorate paraphrased the advice saying that CDRALG 'commends the crew or (*sic*) their efforts, but does not support the submission'.

5. The Submission was then reviewed by the Chief of Air Force (CAF) who wrote to Mr Oatley in December 2002 to inform him that his application for recognition was unsuccessful because:

... the criteria for the award has not been met, particularly (that) ... personnel were in grave and immediate danger,... assets were in danger... or that the environment was hazardous or hostile in nature.

¹ CPD, *House of Representatives (H of R)*, 17 May 1988, p 2417 [Prime Minister, R J L Hawke]

6. After having informed Mr Oatley of his assessment, CAF wrote to the Chief of the Defence Force (CDF) on 10 April 2003, forwarding three nominations (including Mr Oatley's) of which only one - RAAF evacuation of NZ Embassy personnel from Tehran (1979) - was recommended for the award of the ASM with Clasp 'SPECIAL OPS'. On 14 May 2003, CDF agreed with CAF's recommendations and in doing so, refused Mr Oatley's application for recognition.

7. Mr Oatley wrote to his local federal member in October 2004 seeking assistance to review Defence's decision to refuse his application for recognition. This correspondence was referred to the Minister Assisting the Minister for Defence (the Minister). In response, the Deputy Chief of Air Force (DCAF) advised the Minister on 22 November 2004 that in respect of the award of the ASM with Clasp 'SPECIAL OPS', 'there are no stipulated criteria to assess any activity as 'Special Operations''. The unclassified advice added that:

Air Force believed that RAAF personnel may have participated in certain operations (in the past) that may be worthy of recognition as 'Special Ops'. To that end a review was undertaken and CAF agreed that RAAF operations that meet (ten internally developed) criteria may be considered for the classification as clasp 'Special Ops'.

8. The advice included a complete copy of the assessment made of Mr Oatley's claims against each of the ten criteria. It was also noted 'that only a majority of the criteria need to be met, not each individual point', and that CDRALG 'was unable to support the request or justify recommending any further action'. DCAF also advised the Minister that 'based on the information provided by Mr Oatley, ... CAF declined to recommend that the ASM with clasp 'Special Ops' be awarded (and) ... as the approving authority, CDF agreed with CAF's recommendation'.

9. On 5 January 2005, the Minister informed Mr Oatley's local federal member that 'the Air Force had investigated Mr Oatley's submission and ... decided that the criteria for the award was not met'. The advice from the Minister however did not include all of the information that had been provided in respect of the ten criteria, but instead only mentioned that there was not sufficient evidence provided 'to demonstrate that Air Force personnel were in grave and immediate danger or that the Air Force assets were in danger'. Mr Oatley was provided with the Minister's advice as an attachment to the reply from his local federal member on 12 January 2005.

The Tribunal's jurisdiction

10. Mr Oatley applied to the Tribunal on 19 August 2011 to review Defence's decision to refuse his application.

11. There is no dispute that the Tribunal has jurisdiction to hear and determine Mr Oatley's application for review (see ss 110V, 110VA and 110VB(2) of the *Defence Act 1903* and reg 93C of the *Defence Force Regulations 1952*). Mr Oatley in making application on behalf of the RAAF Task G504 crew meets the requirement of ss 110V (1) (a) of the *Defence Act 1903* in that the decision of the Department of Defence (Defence) was a refusal to recommend a person or group of persons for a defence award in relation to eligible service. The role of the Tribunal is to determine whether Defence's decision is the correct and preferred decision having regard to the applicable law and the relevant facts.

12. After exchanges of correspondence with Mr Oatley, the Tribunal determined that it had jurisdiction to proceed with the review, and Mr Oatley was advised as such on 15 June 2012.

Steps taken in the conduct of this review

13. On 21 June 2012, in accordance with the Tribunal's Procedural Rules, the Chair of the Tribunal, Mr Alan Rose, wrote to the Secretary of the Department of Defence advising of Mr Oatley's application for review and invited Defence to make submissions and provide the Tribunal with any material on which it sought to rely. Defence responded with a submission to the Tribunal on 2 August 2012. Mr Oatley was provided with a copy of the Defence submission on 7 August 2012. He responded on 24 August 2012.

14. The Tribunal conducted a Hearing on 13 February 2013 at which Mr Oatley participated by telephone. Following the Hearing, Mr Rose wrote to the Secretary on 14 March 2013, requesting additional information. Defence responded on 12 April 2013. Mr Oatley submitted comments on the Defence response on 4 July 2013.

Mr Oatley's Service

15. Mr Oatley served in the Citizen Military Forces from 1977 to 1979, the Army Reserve from 1979 to 1980 and the RAAF from 18 August 1980 to 22 October 2006. For his service, Mr Oatley has been awarded the Defence Force Service Medal with First and Second Clasps, and the Australian Defence Medal.

Medal Regulations and Eligibility Criteria

16. The Australian Service Medal (ASM) was instituted by Letters Patent on 13 September 1988 for the purpose of 'accord[ing] recognition to members of the Defence Force and certain other persons who render service in certain non-warlike operations'.² The Regulations set out the general requirements for the ASM and state:

The Governor-General on the recommendation of the Minister may declare a non-warlike operation, in which members of the Defence Force are or have been on or after 14 February 1975, engaged, to be a prescribed operation for the purposes of these Regulations.

17. Since 1988, a number of clasps to the ASM have been declared by the Governor-General, including the Clasp 'SPECIAL OPS'. The ASM with Clasp 'SPECIAL OPS' was established in 1997 following discussions between the members of the Committee of Inquiry into Defence and Defence Related Awards (CIDA) and the then CDF. The discussions were based on a submission made to CIDA that certain aspects of submarine service warranted special recognition with a unique medal. In considering the matter, the CDF recognised that there were broader issues involved than just submarine service and recommended to the Government that

² *Commonwealth of Australia Gazette*, S 335, 2 November 1988.

a Special Operations Clasp be established for the ASM. In March 1996, CDF provided advice to the Minister and sought approval:

... for special Australian Defence Force activities of a sensitive and hazardous nature (being non-warlike operations) to be prescribed operations for the purposes of the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.

18. The Minister agreed with the proposal and, while the words 'of a sensitive and hazardous nature' were not carried forward into the subsequent Regulations, those key words have nevertheless been used, to convey the spirit of the Regulations, as the two conditions to be satisfied for the particular service to be considered as 'special Australian Defence Force activities'. Consistent with the circumstances prevailing at the time of the awards previously made, an operation must first have a high degree of sensitivity for the Australian Government as then understood by the CDF. In addition the hazardous element necessary to complete eligibility for the award of the ASM with Clasp 'SPECIAL OPS' is a significant increase in personal risk to the person, beyond that of normal peacetime service.

19. The most recent Declaration and Determination for the ASM with Clasp 'SPECIAL OPS' was made under the Regulations by the Governor-General effective from 8 June 2001 and set out in the *Commonwealth of Australia Gazette* S 230 of 29 June 2001. Previous Declarations and Determinations were revoked. In declaration (b), the Governor-General declared that:

... each special Australian Defence Force activity (being non-warlike operations) occurring on or after 14 February 1975 as is specified by the Chief of the Defence Force for the purposes of this declaration to be a prescribed operation for the purposes of those Regulations.

20. Furthermore, the determination (c)(ii) in part states that:

... the Medal may be awarded to a person who rendered service as part of the Australian element of the *prescribed operation* which is not less than the minimum qualifying period specified by the Chief of the Defence (*sic*) in relation to the operation ...

21. In accordance with the ASM Regulations, the CDF has the sole responsibility to specify which activities will be declared as prescribed operations for the purposes of awarding the Clasp 'SPECIAL OPS'. Only ADF members assigned to that prescribed operation, as declared by the CDF, and who fulfil the minimum qualifying period are eligible for the award. In considering an award of the ASM with Clasp 'SPECIAL OPS', the normal 30 days eligibility period may be waived and an alternative minimum qualifying period substituted at the discretion of CDF.

22. The Clasp 'SPECIAL OPS' was not established to be a 'default' award for personnel who do not qualify for an ASM under the normal conditions that relate to a declared operation. Additionally, it is not awarded with the Australian Active Service Medal or for 'warlike' service.

Recognition of ADF Service by awarding the ASM with Clasp ‘SPECIAL OPS’

23. Since its inception, 1678 ASMs with Clasp ‘SPECIAL OPS’ have been awarded.³ These include awards for the following special activities:

- prescribed submarine operations (ongoing);
- explosive device demolition operations (ongoing);
- Operation Spitfire, East Timor (1999); and
- RAAF evacuation of NZ Embassy personnel from Tehran (1979).

In each case, the CDF determined, in accordance with the Regulations, that the above mentioned operations were non-warlike and involved special activities that were both sensitive and hazardous in nature.

EVIDENCE AND ARGUMENTS

The Arguments of Mr Oatley

24. The essence of Mr Oatley’s written and oral submissions is that RAAF Task G504 in which he participated ‘was a sensitive and hazardous operation that included an armed ADG party deployed to a foreign country to undertake (a) security operation (authorised) by the government and ADF command at the time’. It therefore met the eligibility criteria for the ASM with Clasp ‘SPECIAL OPS’ and as such that service should be recognised. His arguments focused on four areas as follows:

- ***Commander Air Lift Group Recommendation.*** Mr Oatley argued that consideration of his application was tainted by the inference in the CDRALG’s 2001 submission that he ‘cannot support the request nor justify recommending any further action’ was a non-recommendation. The activity occurred twelve years earlier, well before CDRALG’s tenure in command. Mr Oatley argued that since CDRALG ‘could not contribute one way or the other, ...he was forwarding it on to Air Force Headquarters for decision rather than adding any other inference to it at all’. He also submitted that the Directorate’s comment that ‘CDRALG ... does not support the submission’ was ‘an appalling rephrasing of the substance of the submission’.
- ***Assessment Criteria in the Application.*** Mr Oatley said in his oral submission that the routine order, to which he had responded, included ten criteria ‘which in my opinion, the crew met’. He said the advice he had received was that ... ‘sufficient evidence was not provided to demonstrate that RAAF personnel were in grave and immediate danger, RAAF assets were in danger or that the environment was hazardous and hostile in nature’. Mr Oatley ‘dispute(s) this ... in that none of these criteria appear to be

³ Directorate of Honours and Awards e-mails to the Tribunal Secretariat on 20 February 2013 and again on 4 April 2014.

cumulative or mutually exclusive; in other words there is only a need to fulfil one element of these criteria not all of them'. There was no requirement for all criteria to be met.

- ***Similarity with the Tehran Operation.*** Mr Oatley argued that there was similarity in the scenario with the 1979 Tehran operation, which had been recognised with the award of an ASM with Clasp 'SPECIAL OPS', but that in addition, Task G504 was assigned an armed ADG section.

- ***Threat and Hazard.*** Mr Oatley submitted that the authorities at the time believed that there was a significant threat to RAAF assets and personnel. This was clearly demonstrated by the following:

- 'the task was providing supplies to a foreign government (Vanuatu) in the midst of civil unrest. It was a unique and no-notice task that ... fulfilled the criteria of a security operation and thus the award';
- the activity was conducted overseas at the direction of government, rather than an ADF decision alone;
- hazardous conditions existed as a result of civil unrest or threat which are beyond the normal requirements of peacetime service;
- an emergency pre-brief was conducted in the ADF Command Centre in Canberra, 'effectively making it a "security operation"';
- the embarkation of an armed ADG section, with live ammunition, to provide RAAF asset and personnel protection; and
- the Vanuatu Mobile Force could not guarantee safety at the airport.

25. In this review, Mr Oatley is seeking to have his service and that of the crew of RAAF task G504 recognised with an award of the ASM with Clasp 'SPECIAL OPS'.

The Arguments of the Department of Defence

26. The basis of Defence's case is that Mr Oatley is not eligible for the ASM with Clasp 'SPECIAL OPS' because the CDF 'decided that Task G504 not be specified as an eligible activity' for the purposes of the Regulations and as such 'there is no entitlement to a service award for members who conducted (the) activity'. CDF in a pen script on 14 May 2003 wrote 'I agree, ASM (with Clasp 'SO') for ... but not for... WGCDR Oatley'.

27. Defence argued that 'the minimum criteria required to be awarded the ASM with Clasp 'SPECIAL OPS' is as determined by (the) CDF and based on his assessment of the justification and information provided to him by his Service Chief'.

28. Defence argued that in accordance with the ASM Regulations, the CDF 'has the sole responsibility of specifying which activities will be recognised by way of the award of the ASM with Clasp 'SPECIAL OPS''. Defence added that:

Activities will only be specified by the CDF on the recommendation of a Chief of Service. In making a recommendation, the Chief of Service will take into account whether the service may be recognised by an existing award, the nature of the service and whether it falls within the doctrine of 'special operations'.

29. In its 12 April 2013 submission in response to the Tribunal's request for further information, Defence referred to advice from Special Operations Command that the policy documents used by CDF to determine which activities are recognised by the ASM with Clasp 'SPECIAL OPS' are the *Commonwealth of Australia Gazette No. S 230, 29 June 2001* and the *Defence Honours and Awards Manual (DHAM) Vol 1*. It was further submitted that 'these documents state that decisions about qualifying periods for the 'SPECIAL OPS' clasp and determining which operations are 'Prescribed Operations' rest with the CDF'.

30. Defence further submitted that in accordance with the policy documents cited above:

there is no requirement for CDF to record how he reaches his decisions about which activities are to be recognised by the ASM with Clasp 'SPECIAL OPS'. Furthermore, there are no CDF-specific policies or policy guidance relating to making these decisions.

31. In its 2 August 2012 submission, Defence implied that the security situation at the time of the activity was benign by quoting from the 18 May 1988 *House of Representatives Hansard* in which the Prime Minister stated in Parliament that:

the Royal Australian Air Force Hercules arrived in Vila yesterday [17 May 1988] as scheduled and had unloaded quickly and effectively without incident. The material and the equipment had been handed over to the Vanuatu authorities, but so far, I am very pleased to say, that it has not been necessary for that material or equipment to be used.

32. Defence also submitted that the 2004 DCAF advice to the Minister contained the key criteria and Defence's assessment (italicised below) of Mr Oatley's claim that had not been met. These were:

- Royal Australian Air Force personnel were in grave in immediate danger
There is no evidence to suggest that Royal Australian Air Force personnel were in any danger.
- Royal Australian air force assets were in danger
Apart from the aircraft suffering some engine problems the only criteria (sic) put forward is Mr Oatley's opinion that the support may have attracted violence.
- Ingress and egress was uncertain
No evidence has been provided to support this criteria (sic).

TRIBUNAL'S CONSIDERATION

33. The Tribunal's consideration focused on the eligibility criteria of the ASM, the Declarations and Determinations made under the Regulations and whether Defence's actions were consistent with those Regulations. Noting the discussion on

medal regulations and eligibility criteria (see paragraphs 16-22), the Tribunal's consideration of the arguments was on whether the sensitive and hazardous nature of the activity had been adequately established as being beyond that of normal peacetime duties.

Mr Oatley's Submissions and Arguments

34. Mr Oatley argued that his application was tainted due to the inference that it had not been recommended by CDRALG. The Tribunal noted that CDRALG's advice was indeed paraphrased by the Directorate as Mr Oatley had argued. CDRALG's advice was also mentioned by DCAF in his 2004 advice to the Minister. The Tribunal examined the material that was considered by the CDF and found no evidence that CDRALG's advice was referred to by CAF, nor was it included or mentioned in the material before the CDF. The Tribunal is therefore not persuaded that CDRALG's advice played a role in the CDF's decision.

35. Mr Oatley submitted that RAAF Task G504 was similar in scenario to the 1979 Services Assisted Evacuation from Tehran, which had been recognised by the award of the ASM with Clasp 'SPECIAL OPS'. The Tribunal placed no weight on this argument because it is not possible to come to a sustainable conclusion on the basis of comparisons between apparently similar operations. Similar activities should not be used as a precedent or for comparison; while two activities might appear to be alike, no two activities can ever be exactly the same.

36. Mr Oatley argued that the activity was a 'security operation' which was both sensitive and hazardous in nature. In a previous enquiry, the Tribunal had considered what constituted a 'security operation'.⁴ A non-warlike security operation is a military activity where there is risk associated with the assigned task and where the application of force is limited to self defence. This includes hazardous activities that expose individuals to physical risk above and beyond that of normal peacetime duties. In deciding whether an activity should be categorised as a security operation, the possibility of exposure to the risk of harm to an ADF member confronting a belligerent or adversary needs to be determined.

37. In the case of Task G504, the decision by the CDF on whether the activity should be prescribed as a non-warlike operation for the purposes of the Regulations hinges on whether the nature of the activity was both sensitive and hazardous. In regard to the first of those elements, the Tribunal observed that the 2004 DCAF advice to the Minister noted that 'the task was regarded as extremely politically sensitive'. While neither Defence nor Mr Oatley specifically addressed the issue of sensitivity, the Tribunal considers that it is reasonable to conclude from that statement, that the sensitive nature of the activity is established.

⁴ Defence Honours and Awards Tribunal, Report of the *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, 22 December 2009.

38. In regard to the hazardous nature of the activity, Defence argued that sufficient evidence had not been provided to establish the required level of hazard. Mr Oatley disputed Defence's position, but other than noting the existence of civil unrest, he did not offer any compelling evidence in that regard. Mr Oatley submitted that 'the authorities at the time believed that there was a significant threat to RAAF assets and personnel'. The Tribunal in its research found that on 17 May 1988, the Prime Minister made a statement in the parliament describing the circumstances that had arisen and the activity involving Task G504 as it was occurring. He stated that 'the (RAAF) aircraft should be reaching Vila about now'. He also said that New Zealand Prime Minister Lange had told him that he expected a New Zealand aircraft to depart for Vanuatu later that day.⁵ There was no concern expressed in the statement regarding any uncertainty in respect of the security situation interfering with either Australian or New Zealand air operations into Vila. The Tribunal can only reasonably conclude that if 'the authorities at the time believed that there was a significant threat to RAAF assets and personnel' and/or there was considerable sensitivity for both governments as is argued by Mr Oatley, then no public announcement would have been made while the activity was actually occurring or about to occur.

39. Mr Oatley also sought to support his assessment of an elevated level of threat by stating that an armed ADG section was embarked. The Tribunal considers that this does not of itself establish that a higher level of hazard to the individual necessarily exists. Additionally, the Tribunal was unable to determine whether a CDF Operation Instruction⁶ was issued. Nor is there any evidence available to enable an understanding of the reasons behind the decision to embark the ADG section or to suggest that force was authorised to achieve the mission. Further, there is no evidence before the Tribunal to support Mr Oatley's contention that the Vanuatu Mobile Force could not guarantee safety at the airport.

Defence's Submission and Arguments

40. Defence argued that the CDF decided not to specify Task G504 as an 'eligible activity' for the purposes of the Regulations and as such an entitlement to the award has not been established. The Tribunal agrees that the Regulations provide the CDF with 'the sole responsibility of specifying which activities will be recognised'. In doing so, Defence submitted that there is no requirement for CDF to record how he reaches his decisions about which activities are to be recognised. It referred to the *Commonwealth of Australia Gazette No. S 230, 29 June 2001* and the *Defence Honours and Awards Manual (DHAM) Vol 1* as the authority for this proposition. The Tribunal does not accept Defence's position. The cited documents do not and nor can they exempt the CDF's decisions from the provisions of the *Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act)*. Without a record of decision, it

⁵ CPD H of R, 17 May 1988, p 2417 [Hawke]

⁶ A CDF Operation Instruction provides the legal framework in which an operation is conducted. It contains specific orders, a clear mission, a focus on an operational outcome, a defined threat, rules of engagement, authority to carry weapons and live ammunition, specifies an operational area and nominates a specific timeframe for the conduct of the operation.

is unclear to the Tribunal how the CDF would be able to meet the requirements of Section 13(1) of the AD(JR) Act which obligate him to set out findings on material questions of fact, refer to the evidence or other material on which those findings were based and give the reasons for the decision. Also for an individual to be able to exercise his or her right to seek review by the Tribunal under the provisions of the *Defence Act 1903*, it is also legally necessary for the CDF to adequately record the decision he has made. Additionally, in the interests of consistency, later review and good administrative decision making, adequate records of these decisions should be maintained.

41. Notwithstanding Defence's position outlined in the paragraphs above, the Tribunal considers that there is sufficient evidence from the pen script notation made by CDF on CAF's submission to reasonably conclude that CDF did consider Mr Oatley's circumstances and agreed with the recommendations and criteria assessment contained therein.

42. In its 2 August 2012 submission, Defence implied that the security situation was benign by quoting from the 18 May 1988 *House of Representatives Hansard* (see paragraph 31). The Tribunal agrees with the proposition that if the material was 'unloaded quickly and effectively without incident ... (and) had been handed over to the Vanuatu authorities' it is difficult to conclude that the level of hazard to Mr Oatley and the crew of Task G504 was above that expected in peacetime operations.

Other Matters

43. As noted at paragraph 5 of this report, Mr Oatley's submission was reviewed by CAF who wrote to Mr Oatley in December 2002 to inform him that his application for recognition was unsuccessful. It was five months later before the CDF made his decision to refuse Mr Oatley's application. CAF had no authority to make a decision in Mr Oatley's case because he has no delegation under the Regulations. As is correctly noted in the DCAF advice to the Minister on 22 November 2004, CAF could only 'decline to recommend' to CDF. The Tribunal considers that this confusion should not arise. Mr Oatley should have been informed of CDF's decision, as the approving authority, not the decision of CAF.

44. Also in DCAF's 2004 advice to the Minister it was said that in respect of the award of the ASM with Clasp 'SPECIAL OPS', 'there are no stipulated criteria to assess any activity as 'Special Operations''. Defence also stated in its submission that there are no CDF-specific policies or policy guidance relating to making the decisions in respect of the award. The Tribunal notes that not only in Mr Oatley's case, but also other reviews involving the award of the ASM with Clasp 'SPECIAL OPS', Defence has never promulgated policy or explained the role of Service Chiefs in the deliberation process on an individual application. While it is not mandatory to do so, it is the Tribunal's view that clear policy should be authorised, particularly in this case where such a broad discretion, not normally applicable in the consideration of eligibility for awards, is able to be exercised. If clear policies and procedures were in place this would preclude resorting to ad hoc criteria, such as those used in Mr Oatley's case, and ensure that case by case decision making is consistent with the intent of the Regulations. It would also remove any confusion or uncertainty about

the procedures and practices used to determine eligibility and buttress the standing of this important award.

45. Defence submitted that CDF's assessment is based on advice received from the relevant Service Chief as to whether the activity falls within Defence's doctrine of special operations. It is not apparent in regard to Mr Oatley's application that such an assessment was made. In any case, the Tribunal examined Defence's doctrine of special operations and concluded that it is not evident that this doctrine had previously been applied to service that has been recognised with the award of the ASM with Clasp 'SPECIAL OPS'. While the clasp is titled 'SPECIAL OPS', it is awarded in accordance with the Regulations for '*special* Australian Defence Force activities', not for *Special Operations* as defined by the doctrine.

THE TRIBUNAL'S FINDINGS

46. From the material before it, the Tribunal is satisfied that CDF has acted consistently with the Regulations. He has used the discretion provided to him by the Regulations to decide not to specify the activities involving Mr Oatley as a prescribed operation. In doing so, the Tribunal notes that while the criteria used by CAF go well beyond the requirements of the Regulations it is nevertheless satisfied that the CDF has used appropriate criteria to determine which special activities he will specify as prescribed operations, namely that the nature of the special activity is both sensitive and hazardous. The Tribunal finds that Mr Oatley has not made a compelling case that the level of hazard during the Task G504 activity was above that expected in peacetime operations.

47. The Tribunal, having now completed a number of reviews of ASM with clasp 'SPECIAL OPS' decisions, is concerned that a policy setting out the criteria and arrangements for consideration of applications has not been promulgated by the CDF. The anomalies outlined in this review of Mr Oatley's application are indicative of a potentially ad hoc system. It is the Tribunal's view therefore that the longer this lack of clarity persists the greater the potential for progressive erosion in the standing of this important award. The Tribunal has therefore decided to bring its concern expressly to the attention of the CDF and the Secretary and because Mr Oatley has previously brought his case to the attention of the Minister then responsible, it has also provided a copy of this decision to the Parliamentary Secretary for Defence.

48. In conclusion, for the reasons set out above:

- The Tribunal found that the Defence decision should be upheld because:
 - i. it is consistent with the ASM Regulations, and Declarations and Determinations made under those Regulations; and
 - ii. the activities undertaken by Mr Oatley while being sensitive, did not include the elements of hazard and risk that would be associated with the nature of non-warlike operations intended to be recognised for the purposes of the ASM Regulations.
- The Tribunal also brings to the attention of the CDF and the Secretary its concerns about the lack of clear policy, eligibility criteria and arrangements for consideration of applications for the award of the ASM with Clasp 'SPECIAL OPS'.

DECISION

49. The Tribunal has decided to affirm the decision of the Department of Defence that Mr Carl Oatley is not eligible for the award of the Australian Service Medal with Clasp 'SPECIAL OPS'.