



Australian Government

Defence Honours and Awards Appeals Tribunal

David Buckwalter and the Department of Defence [2014] DHAAT 4 (7 March 2014)

File Number(s) 2011/007
Re **David Mark Buckwalter**
APPLICANT

And **Department of Defence**
RESPONDENT

Tribunal Brigadier G. Bornholt AM CSC (Retd) (Presiding Member)
Mrs S. Higgins

Hearing Dates 2, 3 and 16 May 2013

DECISION

On 7 March 2014 the Tribunal decided to recommend to the Minister that:

- (a) the findings of the Tribunal are noted; and
- (b) the decision of the Deputy Chief of Army on 31 May 2012 be affirmed and Mr Buckwalter's request for parity of award with that awarded to Mr Innes be refused.

CATCHWORDS

DEFENCE HONOUR – Military Medal – Mention in Dispatches – where actions of two servicemen involved in the same incident were awarded different levels of honour – actions occurred and awards were made 45 years ago - whether errors in procedure and record of events identified many years later warrant parity in the level of honour so as to award the serviceman with the lesser level of honour with the same level of honour awarded to the other serviceman – priority in awards – integrity of the honours and award system.

LEGISLATION

*Archives Act 1983 – s 26
Defence Act 1903 – ss 110T, 110V(1)(a)(i), 110VB(1)
Defence Force Regulations 1952 - reg 93C and Schd 3
Freedom of Information Act 1982 – s 48*

REASONS FOR DECISION

Introduction

1. In March 2010, Mr David Mark Buckwalter (Mr Buckwalter) wrote to the Governor-General seeking redress in regard to his award, in 1968, of a defence honour, a Mention in Dispatches (MID), for his actions, on 2 May 1967, in a minefield rescue incident, at the Horseshoe Fire Support Base (FSB), in Phouc Tuy Province in South Vietnam. Also involved in the minefield rescue incident was Mr Neil Kenneth Innes (Mr Innes), who was awarded a higher level of honour, a Military Medal (MM), for his actions in the minefield rescue incident. Both men, aged 22, had enlisted on the same day in September 1965 but did not know each other. After recruit training, Mr Buckwalter was allocated to the Royal Australian Infantry Corps as a Private and Mr Innes was allocated to the Royal Australian Engineers as a Sapper. On the day in question in 1967, Mr Buckwalter was serving as a Rifleman with the 6th Battalion of the Royal Australian Regiment (6RAR) and Mr Innes was serving as a Field Engineer in the 1st Field Squadron.
2. By Royal Warrant, dated 26 January 1968, Her Majesty Queen Elizabeth II approved a number of Imperial awards for Australian servicemen, who had served or were continuing to serve in Vietnam. This approval included the award of the MM for Mr Innes and the award of an MID for Mr Buckwalter. These awards were published in the Commonwealth Gazette on 22 February 1968. At about the same time, a number of Australian newspapers contained a report in regard to the awards, including a short article about Mr Innes and his actions, on 2 May 1967.
3. In May 1968, Mr Buckwalter became aware, for the first time, that Mr Innes was the other soldier who had been involved in the 2 May 1967 minefield incident and that he had been awarded an MM for his actions on that day. He was made aware of this in a letter he received from his former Section Commander in Vietnam, Corporal Ross Smith. Corporal Smith said he had seen the article in the newspaper and expressed the view that the article was wrong and Mr Buckwalter should have been awarded the MM. Corporal Smith said in the letter that he had tried his best to have the awards changed but was told it was too late.
4. Mr Buckwalter said he did not pursue the matter any further as he thought the difference in the level of award was due to an applicable quota.
5. However, in more recent years, when previously inaccessible information became available, Mr Buckwalter made a number of requests for access to documents surrounding his and Mr Innes's awards. It was in the course of this exercise that he discovered that the original citation nominating him for an award, drafted by his Officer Commanding (OC), Major O'Brien, and initially recommended by his Commanding Officer (CO), Lieutenant Colonel C Townsend was substituted with another citation which described his role in the minefield incident as assisting Sapper Innes, who was said to have entered the area first. It was on this basis that Mr Buckwalter wrote to the Governor-General seeking 'redress of wrongs.'
6. This application arises from Mr Buckwalter's request for a 'redress of wrongs.'

Jurisdiction

7. The parties did not raise any issues in regard to the Tribunal having jurisdiction to hear this application. Nevertheless, the Tribunal is required to be satisfied that it does have jurisdiction to hear this application as this will determine what orders, if any, it is able to make.

8. The Tribunal's review jurisdiction is set out in Division 3 of Part VIIC of the *Defence Act 1903*. Section 110V sets out which decisions are reviewable by the Tribunal and section 110VA sets out who is able to make an application for review. These sections are in the following terms:

110V What decisions are reviewable?

- (1) A **reviewable decision** is a decision (whether made before or after the commencement of this Part) in relation to which the following conditions are satisfied:
 - (a) the decision is or was a refusal to recommend a person or group of persons for any of the following in relation to eligible service:
 - (i) a defence honour;
 - (ii) ...;
 - (iii) ...;
 - (b) the decision is or was made:
 - (i) ...; or
 - (ii) ...; or
 - (iii) by a person within the Defence Force, or an arm of the Defence Force;
 - (c) the decision is or was made in response to an application.
- (2) ...

110VA Who can apply for review?

An application for review of a **reviewable decision** can only be made by the person, or one or more of the persons, who made the application referred to in paragraph 110V(1)(c).

9. There is no dispute that this application is an application in regard to the service rendered by Mr Buckwalter in Vietnam (i.e. eligible service) and it concerns the award of an honour (see regulation 93B and Part 1 of Schedule 3 of the *Defence Force Regulations 1952*).

10. The question is whether:

- (a) there is a relevant decision, made by a person, as prescribed in paragraph 110V (1)(b) above, and that the decision was made in response to an 'application' as prescribed in paragraph 110V(1)(c); and
- (b) the person making this application is the person who made the 'application' referred to in paragraph 110V(1)(c).

11. To answer these questions it is necessary to briefly set out the relevant background correspondence to this application.

12. Following Mr Buckwalter's 2010 request to the Governor-General, the Army History Unit conducted an inquiry in regard to the alleged 'interference' with the 'original wording of the Citation' for Mr Buckwalter's recommended award. On

9 December 2010, the Army History Unit completed its investigation and submitted a lengthy report. It recommended:

- (a) the reinstatement of the original citation of Lieutenant Colonel Townsend, and
- (b) a review by the Tribunal to ‘determine whether or not there is merit in supporting a review which would lead to consideration by the (Tribunal) as to whether there is any possible injustice in respect of the level of distinction in the award of the MID made to PTE D.M. Buckwalter...’

13. Both recommendations were subsequently referred to the then Deputy Chief of Army, Major General P Symon, for remedial action to be considered or undertaken by Defence. On 19 April 2011, the Deputy Chief of Army wrote to the Tribunal informing it that Defence had been separately requested to reinstate the original citation. Further correspondence related to procedure followed.

14. On 31 May 2012, Major General A Campbell, Deputy Chief of Army, wrote to Mr Buckwalter in response to his 2010 request to the Governor-General. In that response, Major General Campbell said that in light of the investigations of the Army History Unit, he was left with ‘no other option than to support the decision of the Commander 1st Australian Task Force at the time who identified your level of award as Mentioned in Dispatches, and approved the citation as it currently exists.’

15. Subsequent to this response, Mr Buckwalter wrote to the Tribunal expressing his dissatisfaction with the decision (i.e. rejection) of the Deputy Chief of Army and pressed his claim for ‘redress of wrongs.’

16. The Tribunal finds that Mr Buckwalter’s request to the Governor-General is an ‘application’ concerning the award of an honour (i.e. reconsideration of the original recommendation as to the level of his award).

17. The Tribunal also finds that the decision of the Deputy Chief of Army on 31 May 2012 is in effect a decision to refuse Mr Buckwalter’s application (i.e. reconsideration of the original recommendation as to the level of his award).

18. Accordingly, the Tribunal finds that it has jurisdiction to hear this application.

19. The Tribunal’s power in regard to an application for review of a decision concerning an honour is set out in subsection 110 VB of the *Defence Act* 1903, which provides:

110VB Review of decisions by the Tribunal

Decisions relating to defence honours

- (1) If an application is properly made to the Tribunal for review of a reviewable decision relating to a defence honour, the Tribunal:
 - (a) must review the decision; and
 - (b) may make any recommendations to the Minister that the Tribunal considers appropriate.

Note 1: The Tribunal does not have power to affirm or set aside the decision.

Note 2: Formal requirements relating to decisions etc. of the Tribunal are dealt with in section 110XE.

Steps taken in the conduct of the review

20. On 2 August 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 Buckwalter's application for review and invited Defence to make submissions and provide the Tribunal with any material on which it sought to rely. The Defence response, a written submission from Major General Campbell was received on 26 October 2012.

21. Mr Buckwalter was provided with a copy of Defence's written submission and he was invited to respond and submit any further material he may have in support of his application. Mr Buckwalter provided written comments on 15 November 2012

22. After consideration of Defence's response and the comments received from Mr Buckwalter, the Tribunal met in Canberra on 25 February 2013.

23. The Tribunal conducted a public hearing, in Canberra, on 2 and 3 May 2013. Mr Buckwalter appeared. He gave evidence and questioned witnesses. The witnesses giving evidence on these days were:

- (a) Mr Innes (evidence given by telephone),
- (b) Mr R Smith (former Corporal R Smith),
- (c) Mr C Mollison (evidence given by telephone),
- (d) Mr M Atkins (evidence given by telephone),
- (e) Mr G Kelly (evidence given by telephone),
- (f) Mr B Toyer (evidence given by telephone),
- (g) Mr J Cazey (evidence given by telephone), and
- (h) Mr B Hennessy (evidence given by telephone).

24. The Tribunal conducted a further public hearing in Canberra on 16 May 2013. On this day, the Tribunal heard oral evidence from Mr B McFarlane (evidence given by telephone) and, personnel from Defence including, Major General A Campbell, Deputy Chief of Army, and Mr P Clarke and Mr T Sillcock from the Directorate of Honours and Awards. At the close of the hearing the Tribunal gave leave to Mr Buckwalter to provide further written submissions at a later date.

25. Mr Buckwalter provided the Tribunal with further material in support of his submission on 23 March, 13 May and 4 July 2013. He also provided a detailed submission on 3 September 2013 as a follow-up to the May hearings.

Issues

26. During the course of the hearing, Major General Campbell confirmed that steps were to be taken to seek the reinstatement of the original citation which Lieutenant Colonel Townsend had raised on 29 May 1967, nominating Mr Buckwalter for the award of the MID for his actions on the day in question.

27. Accordingly, the issue for determination by the Tribunal is whether the decision of Major General Campbell is the correct and preferred decision; namely given the passage of time and the 'inability to categorically establish the sequence of

events', there is no option other than to support the decision of Lieutenant Colonel Townsend to recommend that Mr Buckwalter be awarded the MID.

28. Mr Buckwalter asserts that as a result of the substituted citation, his actions, on 2 May 1967, were incorrectly described and hence incorrectly assessed when considering the appropriate level of award.

29. In making his assertion, Mr Buckwalter stressed that he was not questioning the level of honour awarded to Mr Innes – he merely sought to be equally recognised for his actions that day.

30. During the course of the hearing, the Tribunal explained a number of times that the decision to recommend Mr Innes for the award of an MM was not the subject of review in this application.

31. Hence the principle matters for determination in this application are:

- (a) who entered the minefield first? Mr Buckwalter, or was it Mr Innes?
- (b) was the recommendation of Lieutenant Colonel Townsend appropriate for the actions of Mr Buckwalter on the day in question?
- (c) should there be parity of awards and if so which honour is the applicable honour that should be recommended after so many years since the events occurred?

The undisputed facts

32. Mr Buckwalter (Private Buckwalter), departed Australia, on 14 August 1966, for active service in South Vietnam, where he was allocated to 6RAR. At the relevant time, Private Buckwalter was stationed at the HORSESHOE FSB, in Phuoc Tuy Province (the Horseshoe). The Horseshoe was so named because of the geographic shape of the feature. The opening and outer sides of the Horseshoe were surrounded by marked protective anti-personnel minefields. These were laid by 1 Troop of 1st Field Squadron of the Royal Australian Engineers. The main access into the Horseshoe was on a road, from the South, that ran through the minefield and the concertina barbed wire fence which was astride the perimeter entrance to the feature.

33. 1 Troop (of which Sapper Innes was a member) was located on low ground about 60-80 metres to the north of the road entrance to the Horseshoe, while 3 Platoon A Company 6 RAR (of which Private Buckwalter was a member) was located on the eastern side of the feature overlooking the entrance and a US Army artillery battery was located in the centre of the Horseshoe.

34. At approximately 1145, on 2 May 1967, three US Army artillery soldiers drove a US Army truck from within the Horseshoe feature to the FSB southern road entrance, with the intention of recovering some discarded defence stores from an abandoned defence post that was now located within the minefield. Two of the US soldiers climbed through the labelled fenceline marking the boundary of the minefield. Approximately 20 metres inside the minefield, an M16 anti-personnel mine was detonated, mortally wounding one of the soldiers and seriously wounding the other (PFC Pardo), who had initiated the detonation of the mine. PFC Pardo was lying badly injured in immediate proximity to the remaining three live mines in the cluster.

35. Upon hearing the mine blast, and being alerted by the third US soldier who ran up the roadway into the FSB shouting 'contact', a number of soldiers from both 1

Troop (including Sapper Innes) and 6RAR (including Private Buckwalter) ran to the minefield. Both Private Buckwalter and Sapper Innes entered the minefield, successfully rendering assistance to and facilitating the safe evacuation of PFC Pardo from the minefield area.

36. Second Lieutenant J Cazey (second-in-command of 1 Troop) arrived at the site several minutes after the incident. Not being a witness to the initial action, he subsequently spoke to Major O'Brien and after interviewing the three Sappers involved, prepared a hand written report in respect of the actions of Sapper Innes. The report was sent that night to Major B Florence (OC 1 Field Squadron) who on 10 May 1967 initiated a citation recommending Sapper Innes for an honour. The citation was in the following terms:

Sapper Neil Kenneth Innes was enlisted in the Australian Army as a National Serviceman on the 29th September, 1965 and was allotted to the Royal Australian Engineers. He joined the 1st Field Squadron in South Vietnam on the 7th September 1966.

On 2nd May, 1967 during Operation LEETON, Sapper Innes was in the 1st Troop forward operational base, at a feature known as the Horseshoe. At approximately 1150 hours Sapper Innes heard an explosion in the vicinity of a minefield approximately 70 metres to the south of his location. He immediately ran to the edge of the minefield where he saw two American Gunners lying wounded on the ground. One soldier was unconscious just outside the minefield, the other was lying in the minefield and was writhing on the ground approximately six inches from another mine.

Sapper Innes entered the minefield, held the wounded soldier firmly to prevent his movement and quietly reassured him to lie still. He then marked a clear lane into the minefield to allow medical aid to come forward.

Sapper Innes, by his immediate and courageous action, prevented the detonation of a second mine and his swift marking of a safe lane made possible the quick evacuation of the wounded. His complete disregard for his own safety displayed a high standard of bravery that reflects great credit upon himself and his Squadron.

37. Major Florence recommended that Sapper Innes be awarded the 'G.M' (i.e. the George Medal). Brigadier Graham, Commander of the 1st Australian Task Force (1 ATF), supported this recommendation, as did Major General Vincent, the Commander of the Australian Force in Vietnam (AFV). These recommendations are recorded on the same form as the citation recommended by Major Florence.

38. Also on 2 May 1967, after the incident, Major O'Brien was briefed by Warrant Officer B Foster (Company Sergeant Major A Company). Major O'Brien later submitted a draft citation to Lieutenant Colonel Townsend who then on 29 May 1967 recommended Private Buckwalter for an honour. That citation was in the following terms:

Private David Mark BUCKWALTER has served as a National Serviceman since 29 September 1965. He joined the 6th Battalion, The Royal Australian Regiment in VIETNAM in August 1966.

On the 3rd May 1967 he was a rifleman with A Company, which was occupying a position on the HORSESHOE FEATURE in PHUOC TUY PROVINCE. Two soldiers of the United States Artillery had entered a minefield and detonated a mine, critically injuring one and seriously injuring the other.

Private BUCKWALTER saw the explosion and immediately ran to their aid. Seeing one man writhing with pain he unhesitatingly entered the minefield and tended to him. His action prevented the injured man from thrashing around and detonating another mine.

His lack of concern for his own safety showed courage of a high order and reflects great credit on his own unselfishness in risking his own life to assist the wounded soldier.

39. Lieutenant Colonel Townsend recommended that Private Buckwalter be awarded the MID.
40. On 29 May 1967, Lieutenant Colonel Townsend also prepared an order of priority for his recommendations for periodical (Operational) honours and awards for the period January to June 1967, which he sent to HQ 1 ATF. The list contained eleven names and of these, eight were recommended for the award of an MID. Of those eight, Mr Buckwalter's name was number six in priority order on that list. The list also contained a recommendation for the award of an MBE to a Major, an MM to another named Private and a BEM to a Sergeant, all serving in 6RAR.
41. Subsequent to this, Brigadier Graham, recommended that Private Buckwalter be awarded the 'QC' (Queen's Commendation for Brave Conduct) and Major General Vincent, recommended that he be awarded the MID. Again, these recommendations are recorded on the same form as the citation submitted by Lieutenant Colonel Townsend.
42. Both citations were forwarded, in late June and early July 1967, to Major General J Andersen, the then Adjutant-General, in Canberra.
43. On 17 July 1967, Major General Andersen, wrote to Major General Vincent in regard to a number of recommendations that had been forwarded for honours and awards consideration. In regard to the citations for Private Buckwalter and Sapper Innes, Andersen said:

I am also returning copies of two other citations (INNES and BUCKWALTER). I would be pleased to receive your advice as to whether they both refer to the same event as there is a great similarity in the citations although the dates vary by one day. In view of the similarity from a 'standards' aspect there is a great disparity in the award recommended and we would find it difficult to explain this to the Minister and Defence. I would appreciate your advice on this also.'

44. Major General Vincent, responded, on 8 August 1967. His response was addressed to Brigadier F Whitelaw, Military Secretary at Army Headquarters, Canberra. In that response he said:

'With regard to the recommendations for Spr Innes and Pte Buckwalter 1 ATF have advised that:

- a. The two citations refer to the same event.
- b. The date on the 6RAR citation for Pte Buckwalter is wrong. The date should read 2 May 67. This has been confirmed by checking the operations logs of 1 Fd Sqn and HQ 1 ATF. ...

The OC 1 Fd Sqn has given the following information:

- a. Spr Innes was the first man on the scene. He entered the minefield and held the wounded American.
- b. Pte Buckwalter then arrived and entered the minefield using a cleared lane identified by Innes.
- c. Buckwalter then held the wounded American, while Innes marked the cleared lane for the medical orderlies.

- d. CO 6 RAR was obviously informed of this by the OC A Coy 6RAR and took these facts into consideration when he recommended Buckwalter for a MID.

The originals of the recommendations for Innes and Buckwalter are held at AHQ. It is suggested that the incorrect date on Buckwalter's (sic) citation be carefully erased and the correct one inserted.'

45. Records show that, notwithstanding Major General Vincent's suggestion of changing the date on Private Buckwalter's citation recommended by Lieutenant Colonel Townsend, a new citation was prepared. The first two and final paragraph of the new citation were in the same terms as the original citation. The third paragraph was deleted and two new paragraphs, in the following terms were inserted:

Private BUCKWALTER seeing the explosion, immediately ran to their aid and entered the minefield using a cleared lane identified by Spr INNES who was the first man on the scene.

Private BUCKWALTER then held the wounded American to prevent him from thrashing around and detonating other mines whilst Spr INNES marked a clear lane into the minefield to allow medical aid to come forward.'

46. Major General Vincent signed the new citation and recommended the award of an MID. On the basis of the new citation for Private Buckwalter, the Acting Adjutant-General, Brigadier H Austin recommended that Private Buckwalter be awarded the MID. This recommendation was recorded on the new citation for Private Buckwalter.

47. It would appear that Brigadier Austin, also recommended that Sapper Innes be awarded the GM.

48. On 22 August 1967, Malcolm Fraser MP (Minister for the Army) wrote to the Minister for Defence, the Hon Allen Fairhall MP supporting the recommendations of Major General Vincent that Sapper Innes be awarded the GM and Private Buckwalter be awarded the MID. In his letter Mr Fraser said '... These awards will be counted against the proposed authorised scale'.

49. On 21 November 1967, the Secretary of the Department of Defence wrote to the Secretary of the Army in regard to the recommendation that Sapper Innes be awarded the GM. In that letter the Secretary of the Department of Defence advised that the Secretary of State for the Commonwealth, through the Official Secretary of the Governor-General, had advised that the George Medal, according to the Royal Warrant, was intended primarily for civilians. It was suggested that in light of Sapper Innes being with a fighting formation it might be considered that the award of the MM would instead be appropriate.

50. On 26 January 1968, Her Majesty approved the award of the MM to Sapper Innes and the award of the MID to Private Buckwalter, together with a number of other awards.

Mr Buckwalter's Submissions and Arguments

51. As mentioned above, the essence of Mr Buckwalter's written and oral submissions is that due to the new citation being used, without reference to Lieutenant Colonel Townsend, his nomination was effectively denied proper consideration for parity of awards arising from the same action.

Who entered the minefield first?

52. In regard to the correct sequence of events, Mr Buckwalter argued that he entered the minefield first and immediately started applying first aid to PFC Pardo. He asserted that the evidence was that Sapper Innes entered the minefield subsequently and assisted him as he was already in the minefield.

53. He argued there was a failure to record the full sequence of events as he was the 'only one soldier who witnessed the lot' and he 'was never interviewed so the information that went to (Major) O'Brien must have been from (Warrant Officer) Foster', who he said was not there at the time he entered the minefield.

54. In support of his contentions and assertions, Mr Buckwalter relied on the evidence of Mr Ross Smith, his then Section Commander, who witnessed the action from his Section (location) position, about 200 m away. He also relied on the evidence of Mr Atkins and Mr Kelly, both of whom were also present in the Section (location) position at that time.

55. Mr Buckwalter also pointed out that Mr Cazey, in his submission, confirmed that he had not recorded Sapper Innes having been the first man on the scene or that he, Private Buckwalter, entered the minefield by a lane cleared by Sapper Innes. He also asserted that at no time has Mr Innes said that he was there first.

56. Mr Buckwalter pointed out that the first record of Sapper Innes being the first man on the scene was that contained in the 8 August 1967 letter, of Major General Vincent, who said it was information provided by 'OC 1 Fd Sqn' (Major Florence). Yet, it was the clear evidence of Mr Cazey, before the Tribunal, that 'there was no cleared lane (in the minefield) and there was no necessity for one.' That is, the information recorded in Major General Vincent's letter was clearly factually incorrect as was the assertion that he, Private Buckwalter, had arrived subsequently and entered the minefield 'using a cleared lane identified by Innes'.

57. Mr Buckwalter asserted that Major Florence, the 'OC 1 Fd Sqn' at the time of the minefield incident, should be called by the Tribunal to give evidence about his involvement, if any, in regard to the information provided to Major General Vincent. Major Florence, Mr Buckwalter noted, did not have any first hand knowledge of what had occurred that day and Mr Buckwalter assumed that incorrect information had been deliberately provided to Major General Vincent.

Lieutenant Colonel Townsend's order of priority

58. Mr Buckwalter suggested that the Tribunal give little weight to Lieutenant Colonel Townsend's list of order of priority, as 'most if not all the rest never were awarded anything'. Mr Buckwalter noted, Major General Vincent, nor any other person, consulted Lieutenant Colonel Townsend, before responding to the query raised by the Adjutant-General, Major General Andersen. He contended that, had Lieutenant Colonel Townsend been aware of the content of the substituted citation and that the award was made on this basis, 'he would have said Private Buckwalter's award stands, you need to rewrite the citations to reflect the truth'. He asserted Lieutenant Colonel Townsend only became aware of the irregularities many years later, shortly before his death.

Parity of Awards

59. Mr Buckwalter submitted that if the citation of his nomination for an award had contained an accurate record of the events, as they occurred, on 2 May 1967, in all likelihood he and Mr Innes would have received the same level of award.

60. Mr Buckwalter went on to submit that, in determining the appropriate level of honour for his actions, the Tribunal should take into consideration where the greatest level of risk lay. In this regard he relied on the following scenarios set out in the oral submission of Major General Campbell:

- If Innes entered first then Buckwalter was shielded;
- If Innes and Buckwalter entered together then Buckwalter assumed greater risk; or
- If Buckwalter entered first then he showed greater courage and absolute risk.

61. Mr Buckwalter's contention is that he entered the minefield first. Hence he assumed greater risk. He also added that, as Sapper Innes 'had enough technical knowledge to know where the mines were' his (i.e. Buckwalter's) early entry to the minefield exposed him to even greater risk. Accordingly, he sought parity, in that his actions on the day in question should be equally recognised to that of Mr Innes, by upgrading his MID to an MM.

Other matters

62. In his closing submission, Mr Buckwalter reiterated that he had initially sought to have the historical record properly recorded. He noted the undertaking of Major General Campbell that a recommendation will be made to have his initial citation restored as part of the official record. However, he appeared to seek to have that record added to in that it should record that he entered the minefield first.

Department of Defence's Submissions and Arguments

63. As indicated above, Defence (including the Army) has conceded that adherence to the established procedure did not appear to have occurred. This concession appears to be limited to the failure to consult Lieutenant Colonel Townsend, following the 17 July 1967 letter from the then Adjutant-General to Major General Andersen. At the same time, Defence does not concede that this was a deliberate failure in that there may be a number of legitimate explanations for this to have occurred. Nevertheless, Defence has accepted that the substituted citation is incorrect and the original citation for Mr Buckwalter should be reinstated into the official record.

64. Defence went on to discuss the form in which these changes would be made, having regard to the amendment provision in s 48 of the *Freedom of Information Act* 1982 and s 26 of the *Archives Act* 1983. It is noted that, in regard to the substituted citation, which is currently part of the official record, Defence argues, by reason of these provisions, that the substituted citation cannot be removed from that record, and can only be amended.

65. Defence also contends that there should be no change to the level of honour that was recommended and awarded to Mr Buckwalter. It argues that no change in the level of award is warranted on a number of grounds.

Retrospectivity

66. The first ground is that of ‘retrospectivity’. It was contended that as a general rule, Defence ‘does not support retrospective recognition for acts of gallantry... arising out of the world wars or other conflicts’. That is, ‘it is not appropriate to question decisions made by Commanders so far in the past, particularly when the Commander in question is unable to defend his actions and decisions.’ It argued that to reconsider today, decisions that were made many years ago was in effect second guessing by applying modern standards, which ‘has the potential to arrive at decisions that are unsustainable and likely to be to the detriment of those in the past and present.’

67. In the case of Mr Buckwalter, Defence argued that ‘at the time of recommending Private Buckwalter for an MID, Lieutenant Colonel Townsend was very experienced in nominating personnel for honours and awards’. Had he ‘believed Private Buckwalter’s action warranted higher recognition he could have nominated as such. As he did not recommend him for a higher award, ‘Private Buckwalter received the (honour) for which he was originally nominated.’

68. On this basis, Defence argued that ‘to second-guess the reasoning leading to the decision by Lieutenant Colonel Townsend to (recommend) the MID for Private Buckwalter would bring into question the validity of other decisions pertaining to honours and awards made by Lieutenant Colonel Townsend’.

Who entered the minefield first?

69. The second ground relates to Mr Buckwalter’s assertion as to the correct sequence of events as to who entered the minefield first. In this regard, Defence contends that there is insufficient evidence to support Mr Buckwalter’s assertion. That is, his assertion is not supported by what has been recorded in the official records. Nor is there any other compelling evidence, which support Mr Buckwalter’s assertion. In this regard, Defence points to the findings of the Australian Army History Unit after examining the available material and also speaking to the relevant persons. These findings are at paragraph 31 of the Army History Unit report, which Defence contended demonstrated that despite an exhaustive investigation, ‘objectively, the sequence of events remains inconclusive after 45 years.’

Other matters

70. Finally, Defence submitted that in ‘assessing Mr Buckwalter’s appeal’ the Tribunal must ensure that the service by Mr Innes is not degraded. However, Defence also contended that in the event the Tribunal were to find ‘a “clear anomaly or manifest injustice” in the awarding of the MID to Mr Buckwalter and recommend that the award be upgraded to an MM, as the award presented to Mr Innes, precedence would indicate that the award should be a Medal for Gallantry.’

71. A Medal for Gallantry, Defence submitted, was the equivalent level of honour, under the Australian system of honours and awards, to the MM, which is an Imperial honour. However, any award for gallantry should be for 'non-operational', or 'non-warlike' service. This, Defence contended, explained why Sapper Innes was initially nominated for a George Medal (act of great bravery in non-warlike situations) and Private Buckwalter's nomination was amended to a Queen's Commendation for Brave Conduct.

Tribunal Consideration and Findings

72. There is no question that there appears to have been a departure from established procedures in the processing of Mr Buckwalter's nomination for an award. This having occurred after Major General Andersen, at Army Headquarters Canberra, who was considering both nominations, sought clarification as to the facts and the disparity between the differing levels of the awards for Mr Buckwalter and Mr Innes. The citation for each nominee did not mention the other nominee, but were very similar in the description of events. The only difference being the date on which the events occurred. At all times it has been accepted that the date on Private Buckwalter's citation was incorrect and that both citations related to the same incident.

73. In regard to the differing recommended level of awards, the Tribunal was informed that this was not unusual where separate nominations and initial recommendations are made, in regard to the same event, through the separate command structures of each nominee. As a general rule these differences in the recommended level of award are considered higher up the chain of command, within Operational Headquarters, or Army Headquarters in Canberra. In this case, that first point in the chain of command was Brigadier Graham at HQ 1 ATF. However, there is no evidence to suggest that either Brigadier Graham or Major General Vincent had both citations before them at the same time. The citations were initiated 19 days apart and although they are both marked as being received by and forwarded from HQ 1 ATF on the same dates, Innes's citation was forwarded from HQ AFV to Canberra on 29 June 1967 while Buckwalter's citation was forwarded on 4 July 1967. It would appear that they were not considered together until they reached Major General Andersen at Army Headquarters in Canberra.

74. The Tribunal was informed that where queries are raised in regard to nominations, the usual procedure was (and continues to be) that clarification is sought back through the command chain from which the nomination arose. Even where clarification is sought and obtained back through the command structure this does not mean that a perceived disparity in the recommended level of award is varied.

75. In this case, there is no evidence that clarification was sought, or obtained from Lieutenant Colonel Townsend in regard to the actions of Private Buckwalter as stated in the original citation or the Commanding Officer's recommended level of award. Clarification was however, sought and obtained through Sapper Innes's command structure.

76. This does not mean, as suggested by Mr Buckwalter, that no effort was made to seek clarification through Lieutenant Colonel Townsend.

77. In any event, as Defence has conceded that the initial citation recommended by Lieutenant Colonel Townsend is the correct citation and is to be reinstated as part

of the official record, it is unnecessary for the Tribunal to consider this issue any further.

The substituted citation for Private Buckwalter

78. On the material before the Tribunal, it is unclear who prepared the substituted citation for Private Buckwalter. What is clear is that it was prepared about the time Major General Vincent wrote his response, on 8 August 1967. There is no evidence on the substitute citation of any consultation with the Commanders of 1 ATF or 6 RAR. In his oral evidence, Mr Czey also confirmed that he did not report that Mr Buckwalter entered the minefield using a cleared lane marked by Mr Innes. The Tribunal also notes that Mr Florence made a statement to the Army History Unit investigation. He said that in regard to Major General Vincent's 8 August 1967 letter quoting advice he had allegedly given, he had 'made no mention to HQ Task Force, or to anyone else, of actions taken by Private Buckwalter during the minefield incident'. He had only confirmed the date as being 2 May 1967 and he had not discussed the detail of Mr Innes's citation.

79. For the reasons set out above, it is unnecessary for the Tribunal to examine who prepared the substituted citation as it is accepted that it is incorrect.

80. On the basis of the findings of the Army History Unit, it is accepted that the substituted citation, in part, is an incorrect record of events that occurred on 2 May 1967. This is especially so in regard to that which is recorded in the third and fourth paragraph of that citation. For the reasons set out below, the Tribunal finds that the evidence supports such a finding.

81. Accordingly, despite Mr Buckwalter's request to do so, there was no basis to call Mr Florence, the former OC of 1 Field Squadron in Vietnam, to give evidence at the hearing. Mr Florence was not a witness to the events that occurred on 2 May 1967. Hence any information he provided would be of little, if any, assistance in determining the question as to who entered the minefield first.

82. In regard to the amendment of the official record, the Tribunal commends the steps that are to be taken, by Defence, to recommend the reinstatement of the original citation recommending Mr Buckwalter's award. The Tribunal also recommends that careful consideration be given to the question as to how the official record is to be amended in the event the substituted citation is not removed. Any amendment that is made should reflect the findings of the Tribunal in that it is a substituted (altered and incorrect) citation, not prepared by Mr Buckwalter's Commanding Officer and that the contents of paragraphs three and four are without doubt an incorrect restatement of the original citation.

Did Private Buckwalter enter the minefield first?

83. The citations drafted by Major O'Brien, on the advice of Warrant Officer Foster, and Major Florence, on the advice of Second Lieutenant Czey, are the most contemporaneous record of events that occurred in the minefield on the day in question. Hence considerable weight should be given to their content. As noted earlier, neither citation refers to the actions of the other. Nor do they state that the citation nominee entered the minefield first.

84. Following an extensive inquiry, into all the available material, the Army History Unit found that Sapper Innes and Private Buckwalter arrived at about the same time: see at paragraph 31 of its report dated 9 December 2010. It also found that the actions of Private Buckwalter were heroic in that he entered the minefield ‘using his own initiative ... knowing it was a definite life or death risk’ and that this was especially commendable.

85. In making its findings, the Army History Unit noted that in some respects it was dealing with recollections of events that occurred some 43 years ago. In some respects, the recollections of those who gave evidence before the Tribunal is even more removed as many witnesses were aware of what had been said by others to the Army History Unit. The Tribunal nevertheless accepts that each witness gave truthful evidence to the best of their recollection.

86. In his oral evidence before the Tribunal, Mr Smith, a Corporal at the relevant time, said that he witnessed what had occurred on that day. He said he was up on the hill of the Horseshoe, in the machine gun pit, about 200 metres from where the incident occurred (i.e. the explosion that wounded the US soldiers). He said it was a clear day and his attention was towards the entry to the Horseshoe when he saw the explosion. He said that he then saw Mr Buckwalter running down the hill. He said Mr Buckwalter was wearing shorts and thongs. He said he saw Mr Buckwalter enter the minefield and administer first aid to the injured soldier (PFC Pardo). He said he saw Mr Innes a few minutes after Mr Buckwalter had entered the minefield and he believed Mr Innes ‘treaded’ very carefully when he entered.

87. In his May 1968 letter to Mr Buckwalter, Mr Smith did not specifically mention Mr Buckwalter having entered the minefield first. What he did say was that Mr Buckwalter should have been awarded the MM as the ‘Army Newspaper got the whole scene wrong & all of the old three Platoon blokes knew it’. He went on to say that they were ‘standing on the edge of “Benny’s” Gun Pit’ watching Mr Buckwalter through the binoculars and it was he and not ‘the Sapper’ who did it all. Mr Smith did not provide any details in the letter of what he had seen Mr Buckwalter do on the day in question.

88. In any event, Mr Smith’s comment that Mr Buckwalter ‘did it all’ is clearly an overstatement as the evidence is that Mr Innes did enter the minefield and provided assistance and marked a safe lane so that PFC Pardo could be safely removed from the minefield on a litter.

89. Mr Atkins and Mr Kelly gave evidence that on the day in question they were also located on the eastern side of the Horseshoe feature. In his oral evidence before the Tribunal, Mr Atkins said, immediately following the explosion, he saw Mr Buckwalter dash into his ‘hoochy’ and grab a medical pack. He said he tried to stop him going down the hill to the minefield because it was dangerous. However, Mr Buckwalter ‘bolted down the hill wearing thongs and shorts straight to the minefield and started rendering assistance.’ He said he had a clear view of Mr Buckwalter, as he was so worried about him. He said no one else was there when Mr Buckwalter arrived and there was no one else there for a minute or two. Mr Kelly gave similar evidence before the Tribunal.

90. In his oral evidence before the Tribunal, Mr Innes confirmed his earlier statement to the Australian War Memorial, in 2005, as being his recollection of events. In that statement Mr Innes said that ‘a medic turned up from the infantry

company that was with us, so we got through the wire, then probed ... our way out to (PFC Pardo)'. Mr Innes also confirmed his recollection that he had heard an American soldier had called out 'contact' and that he and his colleagues responded to this by going towards the road entrance to the Horseshoe.

91. The evidence is that Major O'Brien and Second Lieutenant Cazey were not at the minefield at the relevant time.

92. Second Lieutenant Cazey was returning by vehicle to the Horseshoe, at about lunch time, that day. He and his troop had been laying mines and when he was about a kilometre from the Horseshoe he observed an explosion. He said that when he arrived at the site Mr Buckwalter and Mr Innes were already in the minefield providing assistance to PFC Pardo. He said he saw green cloth hats worn by the surrounding troops being passed, via Mr Buckwalter, to Mr Innes to mark the 'other three mines' in the nearby cluster so that the injured soldier (PFC Pardo) could be safely carried out. The Tribunal understands from the evidence that not long after Mr Buckwalter and Mr Innes entered the minefield a number of soldiers had gathered at the fence to the minefield to provide assistance and that PFC Pardo was carried out by soldiers other than Mr Buckwalter and Mr Innes.

93. Mr Buckwalter did not dispute Mr Cazey's account of events, which are also consistent with the events reported by Mr Cazey on 2 May 1967 and later written in the citation which was recommended eight days later by Major Florence.

94. In his oral evidence, Mr Cazey did not say that Mr Innes entered the minefield first but he inferred that Mr Innes had reached the incident site first, because the engineers were located closer to where the incident had occurred.

95. The Tribunal had some difficulty in accepting this inference was conclusive evidence of who entered the minefield first. While it is correct that the engineers were closer in distance terms, they did not have a direct view of this area from where they were located at the mine dump some 80 metres away. This is reflected in the evidence of Mr Innes that he and his fellow soldiers responded to the incident after they heard the US soldier calling 'contact'. The three engineers, having arrived at the site, initially tended to the mortally wounded US soldier outside the minefield and then discussed which of them should enter the minefield, before Mr Innes proceeded.

96. On the other hand, Mr Buckwalter and the other infantry soldiers had a clear view and could see what was happening. They saw the explosion, and reacted immediately. That Mr Buckwalter ran about 200 metres, without delay and ran as fast as he could is not disputed. Hence, even though he was further away, he reacted first and immediately. At the same time, this does not mean he entered the minefield first.

97. Major O'Brien, in his response to the Army History Unit, said that on this day his role, as Commander of the Horseshoe, was to ensure that rescue arrangements proceeded promptly. This included ensuring that a 'Dustoff' helicopter was called and the appropriate briefings were made.

98. It is apparent from the evidence that Major O'Brien's and Second Lieutenant Cazey's record of events was primarily prepared from accounts given by others as to what had occurred that day. Second Lieutenant Cazey appears to have spoken to Sapper Innes and the other two soldiers (also from 1 Troop) who had accompanied Innes to the incident site. Major O'Brien, on the other hand, appears to have been informed of the events by Warrant Officer Foster. At no time did Major O'Brien speak to Mr Buckwalter, which is not unusual as a nomination for an honour lies

entirely within the discretion of a soldier's Commanding Officer and is normally done on a confidential basis. It is that commander who must be satisfied that witness reports are adequate and the actions of the nominee warrant an honour. The nominator must also be able to articulate with precision the actions of the nominee in order for the nomination to withstand close scrutiny and comparative assessment as it is considered at higher levels of command.

99. There is no suggestion that Lieutenant Colonel Townsend or Major Florence failed to do so. Indeed, Mr Buckwalter has not taken any issue in regard to what is contained in the original citations submitted by these officers.

100. Having regard to all the evidence before it, the Tribunal has some doubt about the reliability of the more recent accounts of who entered the minefield first, Mr Buckwalter or Mr Innes. That doubt, as mentioned above, is primarily due to the affliction of time. Yet there is little doubt about the accuracy of the description of events as submitted by Major O'Brien and Second Lieutenant Cazey very soon after the incident and recorded in the citations. The essence of Mr Buckwalter's complaint is that they were not complete in that they failed to mention he entered the minefield first.

101. For the reasons set out above, the Tribunal finds that there is insufficient evidence to support a conclusive finding in this regard. However, on the basis of their reliability, the Tribunal finds that the inference to be drawn, from the terms of the citations, is that both men entered the minefield at about the same time. This does not exclude Mr Buckwalter having entered first with Mr Innes entering very shortly thereafter. Both attended to PFC Pardo, Mr Buckwalter provided medical assistance (including giving PFC Pardo an injection of morphine) and Mr Innes helped to keep PFC Pardo constrained and identified and marked the location of the nearby active mines. That is, they were both exposed to danger, being well inside the 20 metre lethal radius of the other live M16 mines in the cluster while they were assisting PFC Pardo.

Lieutenant Colonel Townsend's order of priority/retrospectivity

102. The Tribunal is not persuaded by Mr Buckwalter's contention that had Lieutenant Colonel Townsend been consulted at the time clarification was sought by Major General Andersen, Lieutenant Colonel Townsend would have demanded a 'rewrite ... to reflect the truth' and he would have recommended Mr Buckwalter for a higher level of honour. Mr Buckwalter's contention is speculative at best, but also contrary to the evidence.

103. There is no question that Lieutenant Colonel Townsend gave careful consideration to what level of award he would recommend in respect of Mr Buckwalter's nomination. A Commanding Officer's recommendation is very significant. Lieutenant Colonel Townsend had before him the original citation and he weighed the content of this nomination against the content of the other nominations that were before him. This is reflected in his list of priorities that was prepared on 29 May 1967.

104. Nevertheless, the Tribunal accepts that Lieutenant Colonel Townsend would be unlikely to have accepted the substituted citation for Mr Buckwalter. The Tribunal also accepts that if Lieutenant Colonel Townsend had been consulted and been made aware of the response of 'OC 1 Fd Sqn' (Major Florence), as set out in the letter of

Major General Vincent, he might have made further enquiries with the relevant officers in 6RAR. Those enquiries may not have clarified who entered the minefield first and even if they did, this does not mean his recommendation would have differed, as his recommendation had clearly not been made on the basis of the terms of Major O'Brien's submission alone. It was made, as noted above, also in the context of the other nominations he had before him in May 1967, when he arrived at the eleven names in order of priority that he submitted in his periodical (operational) recommendations.

105. The evidence is that Lieutenant Colonel Townsend had considerable experience in making recommendations for honours. He, like many Commanding Officers, based his recommendations for a particular honour relative to other nominations he had made or proposed to make, rather than on an isolated case by case consideration. Private Buckwalter's nomination was made almost at the end of an eventful 12 month tour by 6RAR in South Vietnam. At all times, it was open to Lieutenant Colonel Townsend to have recommended Private Buckwalter for a higher honour. However, on the evidence he did not do so.

106. Nor did, Lieutenant Colonel Townsend have any authority to review or influence the recommendations made in respect of the nomination for Sapper Innes.

107. While the decision of Lieutenant Colonel Townsend to recommend Mr Buckwalter for the award of an MID is not the decision which is the subject of review, the Tribunal accepts the reasoning of Defence that Mr Buckwalter's application is in essence an application to second-guess that decision. The consequences of an approach of this kind, so many years after the decision was made and the context in which it was made, must also bring into question the veracity of the other recommendations, pertaining to honours and awards, Lieutenant Colonel Townsend made at that time.

108. For example, Lieutenant Colonel Townsend placed Private Buckwalter as sixth in his order of priority of those he had nominated for the award of the MID. Additionally, of Lieutenant Colonel Townsend's total eleven nominations for honours on that list, only Private Buckwalter and an officer (Major Smeaton) who was higher in priority, were awarded an MID while Private Winterford was awarded an MM. To recommend an upgrade of Mr Buckwalter's honour from an MID to an MM would place Buckwalter ahead of those above him on the list, including those who although being unsuccessful were nevertheless considered higher in merit by Lieutenant Colonel Townsend. It would also elevate Mr Buckwalter to a different level of honour relative to other soldiers of his Battalion. Hence the standing of other honours for gallantry recommended by Lieutenant Colonel Townsend during the 6RAR tour, including those honours awarded for the Battle of Long Tan (August 1966) and Operation Bribie (February 1967) would arguably be brought into question if Mr Buckwalter were to be recommended, today, for a higher level of award. The Tribunal also notes that there is no evidence of any objection by Lieutenant Colonel Townsend in regard to the decisions to reject his recommendations in regard to the eight nominees on his priority list who were not given any awards.

109. Accordingly, the Tribunal finds that there is no basis to Mr Buckwalter's contention that had Lieutenant Colonel Townsend been consulted, at the time clarification was sought, he would have demanded a 'rewrite ... to reflect the truth' and recommended Mr Buckwalter for a higher level of honour.

Parity of awards

110. Mr Buckwalter's claim for parity with the honour awarded to Mr Innes appears to be a fall-back position on the basis of equity.

111. The Tribunal fully understands Mr Buckwalter's dissatisfaction on discovering that his original recommendation, by Lieutenant Colonel Townsend, had been discarded and a substituted citation, prepared by another person was used and has since then become part of the official record. It is accepted that this created an injustice by introducing events contrary to what his actions were on the day in question. That injustice is to be corrected by Defence.

112. However, it is difficult to see how the injustice of the substituted and incorrect citation justifies Mr Buckwalter being recommended for a higher level of honour today that is at the same level, or equivalent to that awarded to Mr Innes so many years ago.

113. The MM and the MID are both Imperial honours. The MM is a discretionary third level gallantry honour, awarded for acts of gallantry and devotion to duty in action. The MID is a discretionary fourth level gallantry honour, awarded for an act of bravery in an operational area. Hence what Mr Buckwalter seeks is the award of an honour which is one level higher to that which he was awarded.

114. As pointed out above, Lieutenant Colonel Townsend had before him a description of the action written as a citation and after careful thought and consideration he recommended that Mr Buckwalter be awarded an MID. And this is what Mr Buckwalter was awarded.

115. It was at all times open to Lieutenant Colonel Townsend to recommend Mr Buckwalter be awarded the next level of honour, the MM. This he did not do and for the reasons set out above, it is inappropriate, to second-guess the recommendation made so many years ago.

116. Even if there were an argument that, on equitable grounds, that Mr Buckwalter be recommended for the award of the higher level of honour, the Tribunal is of the view, for the reasons stated above, that this would create an injustice to others due to the affliction of time and bring into disrepute the integrity of the honours and awards system.

Findings and Recommendations

117. In summary, for the reasons set out above, the Tribunal finds that:

- (a) There is no conclusive evidence to support Mr Buckwalter's contention that he entered the minefield first. The inference is that he and Mr Innes entered the minefield at about the same time. In any event nothing turns on this as both men entered the minefield knowing it was 'a definite life or death risk.'
- (b) There is no basis to Mr Buckwalter's contention that had Lieutenant Colonel Townsend been consulted after Major General Andersen sought clarification as to the facts and the disparity in the recommendations between those recorded on the citation for Mr Buckwalter and the citation

for Mr Innes, he would have demanded a 'rewrite ... reflect the truth' and recommended Mr Buckwalter for a higher award.

- (c) The evidence is that Lieutenant Colonel Townsend gave careful consideration to his decision as to the appropriate level of award recommended for Mr Buckwalter, based on the original submission by Mr Buckwalter's Officer Commanding, Major O'Brien. Furthermore, Lieutenant Colonel Townsend made his recommendation in the context of all the other nominations before him at that time and those he had recommended previously. To second-guess that decision and the priority he attributed to it, would bring into question the veracity of the other recommendations Lieutenant Colonel Townsend made during the entire 6RAR tour in South Vietnam.
- (d) There is no evidence to justify a recommendation, today, that Mr Buckwalter be awarded the next level of honour which is the same or equivalent to that awarded to Mr Innes (i.e. parity). The injustice to Mr Buckwalter is addressed by the amendment of the official record by the inclusion of the original citation and recommendation of Lieutenant Colonel Townsend and the substituted citation being removed or amended to reflect that it was incorrectly made and contains incorrect information. A recommendation of parity would give rise to injustice to others.
- (e) The decision of the Deputy Chief of Army on 31 May 2012 is the correct and preferred decision.

118. The Tribunal decides to recommend to the Minister that

- (a) the findings of the Tribunal are noted; and
- (b) the decision of the Deputy Chief of Army on 31 May 2012 be affirmed and Mr Buckwalter's request for parity of award with that awarded to Mr Innes be refused.