



Australian Government

Defence Honours and Awards Appeals Tribunal

Hulse and the Department of Defence re: Jensen [2020] DHAAT 15 (27 August 2020)

File Number(s) 2019/018

Re **Lieutenant Colonel G.L. Hulse (Retd) on behalf of
Lieutenant Colonel A.H. Jensen (Retd)**
Applicant

And **The Department of Defence**
Respondent

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

Hearing Date 18 June 2020

DECISION

On 27 August 2020, having reviewed the decision by the Chief of the Army of 30 October 2019 to not support the award of the Distinguished Service Cross to Lieutenant A.H. Jensen for his actions on 13 May 1968, the Tribunal decided to recommend to the Minister for Defence Personnel that he recommend to the Governor-General that Lieutenant A.H. Jensen be awarded the Medal for Gallantry for acts of gallantry in action in hazardous circumstances as the officer commanding the 1st Battalion, the Royal Australian Regiment's mortar line during the Battle for Fire Support Base Coral in Vietnam on 13 May 1968.

CATCHWORDS

DEFENCE HONOUR – Distinguished Service Decorations – Distinguished Service Cross – Gallantry Decorations – Medal for Gallantry - eligibility criteria – 1st Battalion, the Royal Australian Regiment – Fire Support Base Coral – Mortar Platoon - South Vietnam

LEGISLATION

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

Defence Regulation 2016 – Part 6, S35, Defence Honours,

Commonwealth of Australia Gazette No. S25 dated 4 February 1991, Distinguished Service Decorations Regulations

Commonwealth of Australia Gazette No. S25 dated 4 February 1991, Gallantry Decorations Regulations

REASONS FOR DECISION

Introduction

1. The Applicant, Lieutenant Colonel G.L. Hulse, (Retd) seeks review of a decision by the Chief of Army to not support the retrospective award of the Distinguished Service Cross to Lieutenant Colonel A.H. Jensen for his actions during the Battle for Fire Support Base Coral in Vietnam on 13 May 1968.¹ Lieutenant Colonel Jensen retired from the Army in 1990 however he will be referred to as a Lieutenant throughout this report as that was his rank at the time of the action.

2. On 30 June 2017, Lieutenant Colonel Hulse wrote to the Chief of Army drawing his attention to nine individuals who he considered 'should receive a decoration befitting their contribution to their respective operational outcomes'.² Seven of the nine were for actions related to the Battle for Fire Support Bases Coral and Balmoral which occurred between 12 May and 6 June 1968. The remaining two were for other actions in Vietnam in 1969.

3. Lieutenant Jensen was one of the individuals named by Lieutenant Colonel Hulse. He cited Lieutenant Jensen for his actions on the first night of the Battle for Fire Support Base Coral when 1st Battalion, the Royal Australian Regiment's mortar line was over-run by enemy. Lieutenant Colonel Hulse included in his letter a recommended citation 'for an appropriate Australian Defence Force decoration befitting of the personal courage, leadership and dedication to duty in combat that he displayed on 13 May 1968'.³ Lieutenant Colonel Hulse said that:

Lieutenant Jensen has never been recognised for this unique and extraordinary feat of leadership, courage and personal example to his soldiers

4. On 3 July 2018 the Director General Personnel - Army acknowledged Lieutenant Colonel Hulse's letter and asked that he clarify the level of award that he was seeking and provide further evidence to support the submission.⁴

5. On 12 November 2018 Lieutenant Colonel Hulse made application to Army seeking that Lieutenant Jensen be awarded the Distinguished Service Cross 'in recognition of his personal courage, leadership and dedication to duty in combat that he displayed on 13 May 1968'.⁵ The application stated that:

¹ Chief of Army Letter to Lieutenant Colonel Hulse OCA/OUT/2019/BQ6814642 dated 30 October 2019.

² Lieutenant Colonel Hulse letter to Chief of Army dated 30 June 2017.

³ Ibid.

⁴ Letter from Army to Lieutenant Colonel Hulse DGPERS-A OUT/2018/R30719978 dated 3 July 2018.

⁵ Lieutenant Colonel Hulse Application for Distinguished Service Cross dated 12 November 2018.

there is no doubt that the leadership and gallantry of Lieutenant Jensen, under circumstances of extreme peril was exemplary

6. On 30 October 2019 Chief of Army advised Lieutenant Colonel Hulse that he could ‘not find evidence to support a conclusion that maladministration has occurred in this instance’ and in the absence of new evidence he was ‘unable to support the retrospective awarding of the Distinguished Service Cross to Lieutenant Jensen’.⁶

7. On 6 December 2019 Lieutenant Colonel Hulse made application to the Tribunal seeking review of the Chief of Army’s decision regarding the ‘award of a decoration’.⁷

Tribunal Jurisdiction

8. Pursuant to s110VB (1) of the *Defence Act 1903* (the Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V (1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for an honour or award in response to an application. Part 6 of the *Defence Regulation 2016* defines defence honours as being those awards set out in Section 35.

9. The Tribunal was satisfied that Lieutenant Colonel Hulse’s application dated 12 November 2018 to Army seeking the Distinguished Service Cross for Lieutenant Jensen constituted an application as required by s110V(1)(c) of the Act. The Tribunal was satisfied that the Chief of Army’s letter to Lieutenant Colonel Hulse dated 30 October 2019 indicating that he would not support the award of the Distinguished Service Cross constituted a refusal to recommend the award, thus satisfying the requirements of s110V(1)(a) and (b) of the Act and creating the reviewable decision.

10. The Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision in 2019, as required by s110VB (6) of the Act. In accordance with s110VB (1) of the Act, as the Applicant seeks a defence honour, the Tribunal does not have the power to affirm or set aside the decision, but may make any recommendations to the Minister that it considers appropriate.

Conduct of the Review

11. In accordance with its Procedural Rules, on 11 December 2019, the Tribunal wrote to the Secretary of the Department of Defence informing him of Lieutenant

⁶ Chief of Army letter to Lieutenant Colonel Hulse OCA/OUT/2019/BQ6814642 dated 30 October 2019.

⁷ Lieutenant Colonel Hulse Application for Review dated 6 December 2019.

Colonel Hulse's application for review.⁸ The Tribunal requested a merits-based assessment of Lieutenant Jensen's actions against the eligibility criteria for the Distinguished Service Cross and a report on the material questions of fact and reasons for the decision to refuse the original application. The Tribunal also requested that the Secretary provide copies of documentation relied upon in reaching the decision and any other relevant documents.

12. On 17 March 2020, the Director of Honours and Awards in the Department of Defence provided a submission, on behalf of Defence.⁹ The Defence submission did not contain a merits review and concluded that 'no evidence was found suggesting that Lieutenant Jensen was nominated for an award' and 'further, no maladministration or compelling new evidence was found that led Defence to conduct a merit review'. The submission recommended that the decision by Chief of Army to not support the award of the Distinguished Service Cross be affirmed.

13. The Defence submission was forwarded to Lieutenant Colonel Hulse for comment on 20 March 2020.¹⁰ Lieutenant Colonel Hulse responded on 9 April 2020 stating that 'there is nothing in the Defence response that changes my intent to have Lieutenant Jensen's actions on the morning of 13 May 1968 at FSPB Coral recognised'.¹¹

14. The Tribunal met on 25 May 2020 and confirmed the scope of the review, the decision under review and jurisdiction. The Tribunal noted that in accordance with its Procedural Rules the hearing into the matter would be conducted in public and accordingly, a hearing was listed to be held in Canberra on 18 June 2020. The hearing was attended by Lieutenant Jensen, who gave evidence. Lieutenant Colonel Hulse made submissions by telephone conference and several of Lieutenant Jensen's colleagues were made available to give evidence if required by telephone, or in person. The Respondent was represented at the hearing by the Director of Honours and Awards in the Department of Defence, Ms Petrina Cole. Army was represented by Colonel Bronwyn Johnstone, the Director Personnel Policy – Army.

Lieutenant Jensen's Service Record

⁸ Tribunal letter to the Secretary of Defence DHAAT/OUT/2019/310 dated 11 December 2019.

⁹ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2020/0010 dated 17 March 2020.

¹⁰ Tribunal letter to Lieutenant Colonel Hulse DHAAT/OUT/2020/085 dated 20 March 2020.

¹¹ Lieutenant Colonel Hulse letter to the Tribunal dated 9 April 2020.

15. The Defence submission indicated that Lieutenant Jensen enlisted into the Australian Army on 24 January 1963 and on 14 December 1966 was appointed as a Lieutenant and posted to 1st Battalion, the Royal Australian Regiment.¹² His service record indicates that he remained with the 1st Battalion until 1 July 1971 when he was posted to the Infantry Centre where he served until his promotion to Major on 4 February 1974. As a Major he had a number of staff, regimental and instructional appointments before promotion to Lieutenant Colonel on 21 July 1980. He left the Army on 26 February 1990.

16. For his service in the Army, Lieutenant Jensen has been awarded the:

- Unit Citation for Gallantry (CORAL/BALMORAL);
- Australian Active Service Medal 1945-75 with Clasp 'VIETNAM';
- Vietnam Medal;
- Australian Service Medal 1945-75 with Clasp 'SE ASIA';
- Defence Force Service Medal with first and second Clasp;
- National Medal;
- Australian Defence Medal; and
- Republic of Vietnam Campaign Medal.

The Action and Nominations for Recognition

17. The Defence submission provided a synopsis of the action, several witness statements and historical records relating to the action. During the hearing the Tribunal asked that the synopsis detailed in the Defence submission be accepted as the agreed account of the action.¹³ In a subsequent letter to the Tribunal, Defence stated that it 'no longer agrees with the description of events of 13 May 1968 as set out at page 17 of the paginated pack' (the Defence submission).¹⁴

18. **Official History.** Noting the many historical accounts of the action, personal accounts and various records of interviews with witnesses, the Tribunal was satisfied that the official history provides a reasonably accurate description of the action upon which to base an assessment of Lieutenant Jensen's actions.¹⁵ The Tribunal acknowledges that some details of the official history have been disputed, however in its view these are not material to an assessment of Lieutenant Jensen's actions in relation to recognition. An edited description from the official history follows which provides context to the action as it applies to Lieutenant Jensen:

¹² Defence Submission – Review of Eligibility for the Distinguished Service Cross dated 17 March 2020.

¹³ Ibid. Para 11.

¹⁴ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2020/0043 dated 1 July 2020.

¹⁵ Ian McNeill and Ashley Ekins, *On the Offensive: The Australian Army in the Vietnam War 1967-1968*, Allen & Unwin 2003, Chapter 12 - *Battle at Fire Support Base Coral, April – May 1968*.

... the mortar base plate position was located in an open area covered with metre high grass and dotted with small trees. It was adjacent to the gun position and on the outer edge of the base, facing to the north and east. The platoon was separated from the battalion command post and protection troops by approximately 200 metres of open ground.

Two mortars had remained at Nui Dat as a normal procedure to assist in base protection, leaving four mortars for the platoon. The platoon commander, Captain McNally was stationed at the battalion command post and Lieutenant Jensen, the second-in-command of the platoon was in charge of the mortar position ... the only protection for the mortars came from the scattered companies of 1 RAR but they were up to three kilometres away and had large gaps between them. They could be easily by-passed by an attacking enemy. Before last light, efforts were made to coordinate defences and tie in mutual support between the sub-units in the fire support base but arrangements were still incomplete as night fell ... individual shell scrapes less than one metre deep were prepared in the mortar position, some having ground sheets erected over them. Mortar pits were dug to almost one metre.

... by midnight the rain had stopped ... from that time sporadic incidents occurred which only later the Australians realised were enemy reconnaissance parties making preparations for their main attack. At five minutes after midnight, now 13 May, two enemy probed the 1 RAR mortar position ... at about 3.30am rocket and mortar fire began falling on FSB Coral, the heaviest concentration falling on 102 Field Battery and the 1 RAR Mortar Platoon. This intense fire lasted for five minutes. A ten-minute pause followed. Then, heralded by signal flares, North Vietnamese troops rushed the Australian position. The battle would continue in close quarters fighting for over one hour.

Lieutenant Jensen was resting in one of two shell scrapes dug side by side when the enemy bombardment started. The other was occupied by Private Jack Parr, a national serviceman and platoon signaller. They erected a 'hootchie' over the scrapes with their groundsheets. Donning basic webbing they collapsed the shelter so they could observe and direct fire and dashed across to the mortar command post. ... at this moment Private Bailey, second-in-command of a mortar section reported that 'there are about 400 enemy about 50 yards away'.

Jensen, who remained in telephone contact with the 1 RAR command post throughout the night reported this and indicated that the enemy had reached the perimeter. Fire from the New Zealand 161 Battery was falling at an intense rate outside of the perimeter of the base. Shouting his commands, Jensen gave the order to fire his own mortars on maximum elevation and over open sights, but it was too late. He then called out to his platoon to stay under ground because he was bringing in fire from the 3 RAR mortars ...

It was now impossible for Jensen to get his men out. Already they had taken wounded who would be difficult to move. They had no time to secure the mortars before leaving and the enemy had started firing across the area. The gun position was 50 metres to their rear and moving back would expose the men further and crowd the gunners; if they stayed where they were, they still provided the guns with some flank protection. As the first attacking wave came in, the enemy was quickly on them, firing into the position and at any shelters still standing. Jensen saw one of the assaulting troops fire a rocket-propelled grenade into the pit he had just left, blowing his pack to pieces.

The main force of the attack, which consisted of several enemy companies, came from the north-east, through the mortar platoon and then on to 102 Field Battery. The initial assault overran the mortars, the enemy flank moving through the position at speed ...

Shortly before the main attack, however, the Battery had fired a mission to the north and the gunners were still standing at their posts. 'As luck would have it' said Jensen, 'the guns were then facing directly into the line or direction of the assault'. As the enemy approached, 'the guns then commenced the firing over open sights which tended to break up the assault'. High explosive ammunition and splintex rounds containing thousands of small darts were fired across the front of the mortar platoon ... however, as the enemy fought over possession of the mortars, Jensen was faced with the possibility of his platoon being annihilated. Already two men who had tried to dash from their pits had been struck down and killed. In desperation, Jensen saw the only option open to him was to direct the fire ... onto his own position. He had been providing very clear reports of the situation and Bennett [the Commanding Officer] had no compunction in agreeing to the fire missions. Several times Jensen called for such fire ... 'stay down', Jensen shouted to his platoon each time through the din, 'splintex coming in'. He would then immediately call for fire and the bangs quickly followed ...

The enemy were well-trained, well-equipped and highly motivated, and displayed outstanding bravery and determination, but they could not prevail in the face of the Australian's abundant fire support and the courageous way in which they fought – despite their hasty preparation and only partially coordinated defence. By 4.30am the enemy main attack had begun to falter. They withdrew into the rubber plantation in the north-east ...

The mortar platoon took the heaviest losses, with five soldiers killed and eight wounded from a total strength of eighteen men ...

19. **Lieutenant Jensen's Evidence.** At the hearing Lieutenant Jensen gave evidence which clarified and expanded on his actions and what transpired on the morning of 13 May 1968.¹⁶ An edited record of that evidence follows:

When I arrived at Coral, and we got in there pretty late, Hugh McNally, the Platoon Commander met me and took me over to where we were going to be alongside the guns. He said, 'I'm sorry you're over here on the perimeter. We'll see if we can sort that out next time, but D Company 3 RAR are over there somewhere to the west, south-west'. He then left me to it and I took up my responsibilities of siting the platoon. Each mortar base plate is commanded by a corporal and each section of mortars is commanded by a sergeant. The rest of the platoon such as the platoon commander and mortar fire controllers who are with the rifle companies were not there. I laid the mortar line out with each mortar about 10 metres apart and I set up a command post between them and central. We covered an area of about 30 metres and we were about 30 metres in front of 102 Field Battery's Number 5 Gun.

I then went looking for the Gunnery Positioning Officer [Lieutenant Ahearn] because I had two machine guns with me and was looking for somewhere to put them because we needed to coordinate our defence. The actual siting of the machine guns was the responsibility of the Artillery Regimental Second in Command but we did not know where he was so Lieutenant Ahearn and I sited our respective machine guns. He had already sited two machine guns in front of the artillery so I went ahead and sited my machine guns. I make this point to illustrate that I was the commander - I sited the machine guns and took the full responsibility for where they were going as it was me who was going to have to fight them in the event that something happened. I then got the soldiers digging and got shell scrapes in and all that sort of thing.

... we were outnumbered by about 20 to one on the mortar line, I could see the enemy coming in and then Hickey told me there are about 400 of them and I could see nothing wrong with his observation. They covered right across the front of the guns as well as the front of us. I could see a couple of waves of enemy from gunfire and flashes and I did a quick appreciation as to what I had - I had the guns to support me and 161 Battery and the 3 RAR mortars. And I had my own diggers.

As I was arriving at the command post, an RPG was fired into the sleeping bay behind us and there were a couple of others going off around me. I worked out that there was just no place to go. I had the four mortars and 70 rounds of mortar ammunition per tube. I couldn't afford to leave those to the enemy.

¹⁶ Lieutenant Colonel A. Jensen, Oral Evidence, Public Hearing, Canberra, 18 June 2020 (Transcript P.26)

At this stage I was aware of a couple of casualties and I heard Jack giving a sitrep on the mortar net as to what was going on. I got onto the battalion command net and told them what was happening, they kept asking me to 'say again, repeat, are you sure'. When I had convinced them there was something going on, I asked Jack to send the fire orders through to get the Final Protective Fire (FPF) target fired and I said 'fire the FPF, drop 100 and five rounds fire for effect'. From then on, I adjusted the fire and Jack would relay the commands. That's the way it worked all night - we had a lot of artillery come in. We also had 'Spooky' overhead, but basically Jack was on the fire support net so that's where the adjustments were being made. I was on the command net constantly telling the CO what was happening in our position.

At one-point Hickey, who was nearing the end of his second tour in Vietnam, said, 'we've got to get out of here, let's back up, we've got to go.' I said, 'no, stay where you are and get underground'. I'd already told them once that I was calling in fire on the position. I told them to stay in the shell scrape and engage whatever was above ground. Shortly after that he was shot.

20. In relation to indirect fire, Lieutenant Jensen confirmed that he had taken about 15 minutes to persuade the Commanding Officer, Lieutenant Colonel P.H. Bennett to approve fire onto his own position.¹⁷ He said he told Colonel Bennett that they were in 'desperate stakes' and illustrated the 'severity of our plight' by letting him know what the casualties were. He said that at that stage, he was aware that he'd lost two section commanders, another digger had probably been lost and he had a number of wounded. He then witnessed another soldier being killed by machine gun fire. He said that he called for fire and adjusted it onto his position and that this was being done for a considerable period of time and well before the use of splintex. He said that the mortars were firing at minimum range and when combined with the guns from 161 Battery, the effect on the ground was dangerous to his own troops. He also confirmed that he was adjusting other supporting fire including from aerial assets, all the while commanding his soldiers in their individual fight at close quarters.

21. Lieutenant Jensen said that at this time he was also in contact with Lieutenant Ahearn at the gun position, but each time they shouted to each other they were engaged with machine gun fire. He was also subjected to grenade attack with one landing right beside the command post parapet.

22. In relation to firing splintex, Lieutenant Jensen said that he didn't care what kind of fire he got as long as it was fire onto the position. He said it was the Commanding

¹⁷ Lieutenant Colonel A. Jensen, Oral Evidence, Public Hearing, Canberra, 18 June 2020 (Transcript P.33)

Officer who told him that he was ‘thinking of firing splintex over you, are you prepared to take casualties?’¹⁸ He said yes.

23. Lieutenant Jensen said that he was aware that Lieutenant Ahearn had been experimenting with splintex fuses and that when he was ready to fire, he told Lieutenant Jensen who ordered his troops to ‘get underground, splintex coming in. Stay down. Stay down. Stay down.’ He said they fired three times and each time put five rounds through the position. He said that:

*you heard it go overhead, there's a big swoosh and the next morning, you could see quite clearly, two of the mortars had the splintex imbedded in the barrels. Half the ammunition was contaminated. The radios alongside Jack and my head were both penetrated. The mortar cases had splintex in them.*¹⁹

24. In relation to whether or not the Anti-Tank Platoon fired splintex over the position Lieutenant Jensen said that they ‘were not in a position to fire onto our position, they could fire into the assaulting wave, but they couldn't fire on our position because they didn't have a line of sight.

25. **Gallantry.** Noting that Lieutenant Colonel Hulse was seeking recognition for the ‘leadership and gallantry of Lieutenant Jensen, under circumstances of extreme peril’, the Tribunal asked Lieutenant Jensen during the hearing whether or not he considered his actions to have been gallant. He said:

*We got through it and I remember thinking that we'd done well. Our training had shown to be effective. In relation to gallantry, humility makes it difficult for me to answer, but I think in the circumstances that I was facing at the time, a hazardous, perilous situation, and I wasn't sure how many of us were going to get out of it. Some or all of us were going to pay the ultimate price, and I'm guessing that at the very least it was gallant.*²⁰

As part of the whole process of deciding what I was going to do, I realised that there were going to be casualties and there was a fair chance that some or all of us were going to be killed. It was fairly perilous where we were and hazardous to say the very least. I thought that if we weren't killed then there was a good chance of being taken prisoner of war. I wasn't sure how we'd handle that. So, I then thought well, the other option is to get into it and fight and take somebody with me. And so, we got into it. But I was well aware that we were in a really hazardous situation and I had to do whatever I could to get

¹⁸ Lieutenant Colonel A. Jensen, Oral Evidence, Public Hearing, Canberra, 18 June 2020 (Transcript P.28)

¹⁹ Lieutenant Colonel A. Jensen, Oral Evidence, Public Hearing, Canberra, 18 June 2020 (Transcript P.34)

²⁰ Lieutenant Colonel A. Jensen, Oral Evidence, Public Hearing, Canberra, 18 June 2020 (Transcript P.66)

*us out of it. The only solution I had was to call the fire onto the position because at that stage, we had enemy all over the top of us.*²¹

26. **Witness Statements.** The various submissions and previous inquiry reports contain numerous accounts of the engagement and of Lieutenant Jensen's actions on the morning of 13 May 1968. Extracts from those witnesses where it relates to Lieutenant Jensen follow.

27. The closest witness to the action was Lance Corporal Alan Parr who was the radio operator with Lieutenant Jensen. He said he was the only unwounded member of the mortar platoon to remain at Fire Support Base Coral after the first attack.²² He said he was personally no more than one metre from Lieutenant Jensen during the whole period of the attack and in his opinion, 'Jensen should be considered for a bravery award'.

28. Lance Corporal Parr said:

... the human wave assault advanced through our position with Tony defending one side of the CP and me the other ... he made the level headed and wise decision to remain in this position with the little protection it gave ...in the best way he could under the circumstances, he ordered the men of his platoon to engage the enemy with their personal weapons and to remain in their pits. That was akin to saying that your best chances of survival was to stay and fight off the attacking enemy.

... as the enemy had completely overrun our position and there were many enemy amongst us, the situation was extremely dire and survival almost impossible ... his focus at this time was to ask for as much fire support as possible. He was able to coordinate, via radio, a fire mission from 161 Battery initially onto a defensive fire task to the east; with corrections he was able to bring this artillery fire closer to where the battle was raging. ... some of the rounds fell in and around our position.

... Lieutenant Jensen from an exposed position was able to make verbal communication with 102 Battery situated about 30 metres to his rear. From this position he was able to bring direct fire of splintex from the 105mm guns into the platoon position ... whilst still under enemy fire Lieutenant Jensen was still able to direct fire support and render assistance to his wounded men.

... he was prepared to take friendly fire from the artillery and mortars on to his own position in order to survive the most perilous situation. That 13 men did

²¹ Lieutenant Colonel A. Jensen, Oral Evidence, Public Hearing, Canberra, 18 June 2020 (Transcript P.31)

²² Alan Parr Submissions, Attachment 2-5-7 to the original submission by Lieutenant Colonel Hulse.

survive, albeit with eight wounded, affirmed his judgement and decision to stay and fight.

29. Lance Corporal Parr concluded that:

Due to his personal bravery, leadership and calmness under enemy fire, and his ability to observe the enemy, assess the situation, issue orders and direct fire support, Lieutenant Jensen was able to bring maximum fire and very close fire support on to the assaulting enemy thus blunting and repelling the enemy attack. Although his platoon suffered heavy casualties it is a testament to his personal leadership and gallantry that the whole platoon was not annihilated in this dire and perilous situation.

30. Mortarman, Private Brian McInnery was shot in the left arm whilst firing at the enemy from his shell-scape early in the assault.²³ He said:

... my left arm was completely numb and I dropped my rifle onto my knees. As I was feeling for where the wound was, I looked up and saw this NVA soldier standing above me. He fired his AK47 at me but the rounds impacted along a line in front of my feet. I could feel the impact of the bullets in the ground through my boots. I saw the NVA soldier line me up again for another burst of fire but before he could do that, Lieutenant Tony Jensen fired and shot him dead. There can be no doubt that Tony saved my life right there.

I then heard Tony shouting at us all to get down because he had called in fire and it was going to impact in and around the Mortar Platoon.

There is no doubt in my mind that had it not been for Tony's coolness and level-headed judgement on 13 May the whole platoon would have perished. ... His call for fire on top of the platoon position was the key to our survival.

I also can't believe that Tony was not decorated for his actions that day. It's hard to work out why his actions were ignored – it beggars belief.

31. **Was a Nomination for Recognition of Lieutenant Jensen Raised in 1968?**

During the hearing, the Tribunal heard evidence from Colonel Michael Bindley who was a Captain in 1968.²⁴ In his capacity as the Officer Commanding Support Company, he was Lieutenant Jensen's Company Commander. He was located in his own company command post approximately 150 metres from the mortar line on the morning of 13 May 1968. He was monitoring the battle on the Battalion command net. He was asked at the hearing why he thought the Commanding Officer never recommended

²³ Lieutenant Colonel Hulse Submission to the Tribunal dated 25 May 2020, extract of a statement by Private McInnery.

²⁴ Colonel M. Bindley, Oral Evidence, Public Hearing, Canberra, 18 June 2020 (Transcript P.38)

Lieutenant Jensen for recognition. He said that he and the Adjutant, Captain Davies were tasked to write up individual nominations for recognition. He said 'I remember actually using the book on Victoria Crosses to get the right wording'. Colonel Bindley said that they drafted a nomination for a gallantry award for Lieutenant Jensen but he could not recall what level the award was as he thought that 'levels were not included in those days'. He said they were asked to just write the citation and their understanding was that as it went up the chain, the appropriate level of award would be added.

32. Colonel Bindley said that he could think of no particular reason why Colonel Bennett would have said no to the recommendation particularly as he (Bindley) considered that Lieutenant Jensen's leadership of his men was 'absolutely exemplary'. He said Lieutenant Jensen 'had managed to get them to do what had to be done, and the fact that he reorganised that platoon without missing a beat was an indication of how good he was'.

33. Colonel Bindley said that there was no record of the citation that he drafted that he was aware of. He assumed that it had gone forward as an immediate nomination with others from the Battle for Fire Support Base Coral. He said that there were definitely immediate awards approved as they were announced whilst the Battalion was onboard the ship returning to Australia. He said he and his colleagues had no idea what happened to the Jensen nomination.

34. The Tribunal asked Defence if it considered this to be new evidence or perhaps an indication of maladministration, and if so, whether it would cause it to conduct a merits review of the matter.

35. Defence took the question on notice and asked for an adjournment to consider its position. Defence subsequently provided a statement it had commissioned from Colonel Bindley dated 23 July 2020.²⁵ In this statement, Colonel Bindley expanded on his oral evidence and said that he had a very clear picture of what was happening in the mortar position. He said he also had the opportunity to talk with survivors to gain an idea of what had taken place during the night and he gained further information from these survivors when the Battalion returned to Nui Nat on 6 June 1968. He said that:

this information was the basis of the decision to recommend Lieutenant Jensen for a gallantry award

36. Colonel Bindley said that having gathered what he considered to be sufficient information to proceed with a recommendation, he had sought the help of the Adjutant to compose the required document and nomination and it was then forwarded to the Battalion Headquarters. Colonel Bindley said that he and the Adjutant had agreed that:

²⁵ Written Responses by Colonel Bindley in Relation to Hulse on Behalf of Jensen dated 23 July 2020.

the appropriate award for Lieutenant Jensen should be, at the very least a Military Cross and could be considered for the award of a Victoria Cross

37. Was the Commanding Officer Aware of Lieutenant Jensen's Actions?

Notwithstanding the Defence view that the correct process was apparently followed at the time, the Tribunal noted that there was contemporary evidence that Colonel Bennett was not only aware of the action, but also of the significance of Lieutenant Jensen's actions. The then General Bennett gave a public address at the 38th Commemoration of the Battle for Fire Support Base Coral in 2006.²⁶ In that address he named a number of individuals and commented on their professionalism, gallantry or performance of duties during the battle. He individually cited Major Adamson, Lieutenant Weekes, Captain Bindley and Captain Davies during the address. In relation to the action on 13 May 1968 he said:

... in those three hours or so, Lieutenant Tony Jensen and the 17 men in his position and the Gun Position Officer, Captain Ahern, with the men of 102 Battery, fought most courageously in close quarter combat. The efforts of these men throughout that night displayed all of the determination and personal courage Australian soldiers are so well known for in battle.

38. Nominations for Recognition as a Result of the Battle for Fire Support Base Coral.

The Tribunal researched the archive seeking copies of the nominations made by Colonel Bennett for gallantry awards for the Battle of Fire Support Base Coral.²⁷ With the exception of Private Norden, all of the nominations were compiled at the end of the Battalion's tour on 30 November 1968. It appears that Private Norden's nomination for the Distinguished Conduct Medal was effectively processed as an immediate honour for an action on 14 May 1968. The award was gazetted on 29 August 1968.

39. The Tribunal could find no evidence that any of the nominations submitted by the Commanding Officer either immediately (in the case of Private Norden), or periodically at the end of the tour, were in relation to the action on the morning of 13 May 1968. Most related to actions on 27 April, 14 May, 16 May and 30 May 1968. The Tribunal noted that many of the Commanding Officer's nominations were downgraded at either the Task Force or Command level in theatre.

²⁶ General Sir Phillip Bennett, Coral Address 2006.

²⁷ AWM Excerpt 119 603 Part 1, containing original Recommendations for Honours or Awards for 1 RAR officers and soldiers - Hammett, Bennett, Griffiths, Flematti, Salter, Weekes, Campbell, Bowcock, Sutton, Smith, Terronova, Norden, and Molnar.

The Applicant's Submissions

40. **Written Submission.** Lieutenant Colonel Hulse's written submission was provided to the Tribunal on 25 May 2020.²⁸ In his submission he stated:

*Lieutenant Jensen was never recognised for his outstanding feat of leadership, courage and personal example under extreme circumstances. It is difficult to believe that his Commander did not recommend him for a decoration given the disastrous circumstances that he overcame on 13 May and then went on to provide further critical combat support just three days later on 16 May 1968. It is my suspicion that the issue was avoided in order to deflect some inconvenient truths which could include the dubious HQ IATF intelligence picture that caused a dispersed infantry battalion to leave its FSPB unprotected and the Mortar Platoon's insertion, location and subsequent exposure was based on questionable managerial decisions by HQ IRAR. To have recommended Lieutenant Jensen for a decoration would have brought attention to the defects in managerial competence that led to his predicament – and that had the potential to cast a shadow over the reputation of the senior Commanders.*²⁹

41. Lieutenant Colonel Hulse identified the Letters Patent for the Distinguished Service Cross and noted that it is awarded for 'distinguished command and leadership in action'. He said:

*Lieutenant Tony Jensen provided unquestionable distinguished command and leadership during the Battle of FSPB Coral-Balmoral particularly on 13 May 1968.*³⁰

42. Lieutenant Colonel Hulse concluded his submission with a recommendation that:

as a veteran of the Battle of FSPB Coral and Balmoral, I request that the Tribunal recognize the outstanding courage, determination, command and leadership of LT Tony Jensen by recommending that he be awarded the Distinguished Service Cross.

43. **Submissions at Hearing.** During the hearing, Lieutenant Colonel Hulse made detailed submissions.³¹ He submitted that there were five factors which should be considered in relation to Lieutenant Jensen's actions:

²⁸ Lieutenant Colonel Hulse Submission to the Tribunal dated 25 May 2020.

²⁹ Ibid.

³⁰ Ibid.

³¹ Lieutenant Colonel G. Hulse, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript from P.5)

a. **Uniqueness.** Lieutenant Colonel Hulse said that the circumstances which occurred on 13 May 1968 in relation to the mortar line were unique. He said that there was no precedent for an Australian mortar line being positioned on the perimeter of a position and then being ‘overcome’ by the enemy. He said that Lieutenant Jensen was in charge of the mortar line and had sited the weapon systems and personnel to be able to conduct their primary role – indirect fire support. He said that there was no suggestion that the mortar line was to be used to defend the perimeter against a determined enemy assault yet this was what transpired.

b. **The Choice to Stay and Fight.** Lieutenant Colonel Hulse submitted that the focus of the enemy attack was on the capture of the guns of 102 Field Battery. However, once the enemy were inside the perimeter and within the area occupied by the mortar line, Lieutenant Jensen realised that he was in an untenable position and had three options open to him – withdraw, surrender or stay where he was and fight. He chose the last option and commenced a fight for survival, including a decision to call in as much fire support as was available onto his own position. He said that when the fire did come Lieutenant Jensen warned his soldiers by shouting orders for them to get down under cover. Lieutenant Colonel Hulse suggested that the enemy would have also heard Lieutenant Jensen’s commands, and knew precisely where he was located and he would have become a target. He said that despite this, ‘Jensen didn’t care’. He said that he ‘wanted fire on his position because he wanted to devastate the enemy’.

c. **Personal Qualities.** Lieutenant Colonel Hulse said that during the engagement ‘melee’, Lieutenant Jensen demonstrated remarkable coolness under pressure, and demonstrated outstanding personal qualities including as a rifleman himself wherein his actions saved at least one of his soldiers who was unable to defend himself. Lieutenant Colonel Hulse said that it was clear that Lieutenant Jensen was not just involved in coordinating fire onto and within the position but he was also ‘in the middle of the action as a rifleman himself’. He said that even after the battle and the loss of several soldiers, Lieutenant Jensen was actively involved in the reconstitution of the mortar line into a cohesive unit within two days. Lieutenant Colonel Hulse submitted Lieutenant Jensen ‘clearly and efficiently commanded his platoon under extreme combat conditions on 13 May’ and that his ‘personal courage, determination, resilience, command and leadership skills were outstanding’.

d. **Failure to Recognise Lieutenant Jensen.** Lieutenant Colonel Hulse opined that the failure to nominate Lieutenant Jensen for recognition after the battle was ‘reprehensible’ given what he had accomplished at Fire Support Base Coral. He said it was his opinion that the issue was ‘avoided in order to repress some inconvenient truths’ regarding the employment of the mortar line.

Lieutenant Colonel Hulse conceded that he had no evidence to support this position but it was a ‘suspicion’.

e. **The Respondent’s Position.** Lieutenant Colonel Hulse said that the Defence position to uphold the commander’s decision at the time to not nominate Lieutenant Jensen for recognition was not supported by the evidence. He said that the fact was that there was no decision made by the Commander at the time. He also refuted Defence’s statements regarding the opportunity to rectify the situation through various previous reviews. He said that end of war lists and reviews were focussed on re-consideration of ‘those service personnel who were recommended for an internal honour or were subsequently downgraded or struck out’. He said that in this circumstance, Lieutenant Jensen was never recommended for an award so could not have been considered under the terms of these previous reviews.

44. **Appropriateness of the Distinguished Service Cross.** During the hearing Lieutenant Colonel Hulse was asked why he had decided to proceed with a recommendation for the Distinguished Service Cross and whether he had considered nominating Lieutenant Jensen for a gallantry decoration. He said that he had considered other options but thought that the Distinguished Service Cross was the most appropriate.³²

45. **Eligibility Criteria for the Distinguished Service Cross.** The Tribunal noted that Lieutenant Colonel Hulse’s submissions had not attempted to address the eligibility criteria for the Distinguished Service Cross. During the hearing, the Tribunal asked Lieutenant Colonel to address the criteria, particularly distinguished command and distinguished leadership, noting that there was no dispute that Lieutenant Jensen was ‘in action’ on 13 May 1968.

46. **Command.** In relation to command, Lieutenant Colonel Hulse acknowledged that Lieutenant Jensen was not the mortar platoon commander but was appointed as the mortar platoon second-in-command.³³ The platoon commander, Captain McNally was located with the Commanding Officer in the command post several hundred metres from the mortar line which was doctrinally the way mortars and the mortarmen were deployed. He said that Lieutenant Jensen was in command of the 18 soldiers, and the mortars on the ground. He had full responsibility for their positioning and for commanding them during the engagement. Lieutenant Colonel Hulse said that the platoon commander was not in a position to do this or to issue orders. ‘Lieutenant Jensen was commanding the mortar line - he gave the orders, and he made decisions. He didn't ask for permissions to stand and fight - he didn't ask the platoon commander

³² Lieutenant Colonel G. Hulse, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.15)

³³ Lieutenant Colonel G. Hulse, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.16)

for permission to call fire onto his own position – that was his decision – he was exercising command’.

47. Lieutenant Colonel Hulse said that Lieutenant Jensen was responsible for supervision of the mortar line and command of it. The Tribunal noted that in contemporary structures, the officer responsible for the mortar line is known as the Mortar Line Officer – reflecting his command and leadership responsibilities for the mortar line whilst deployed into the field or on operations.

48. **Leadership.** In relation to leadership Lieutenant Colonel Hulse said that in his view, leadership was about getting people ‘to do exactly what you want them to do, even if it's unpopular’.³⁴ He said that was what Lieutenant Jensen did – he made a ‘stand and fight call’. He said that despite being surrounded ‘he didn't surrender, which he would have been quite perfectly entitled to do’. He said that Lieutenant Jensen’s men believed in him and when he made the call to fight, ‘they followed him -that's leadership’.

49. **Distinguished Service.** In relation to ‘distinguished’ service, Lieutenant Colonel Hulse said that for service to be so it should be ‘absolutely outstanding and out of the ordinary’.³⁵ He said that Lieutenant Jensen demonstrated ‘all of the virtues of being an officer - coolness, calmness, good decision making, making options that were right at the time’. He said that what he did was ‘beyond the prescribed and without precedent’. He said that it was ‘truly outstanding, and beyond outstanding, it was distinguished – it had never happened before – it was in my opinion distinguished’.

50. **Gallantry.** The Tribunal pressed Lieutenant Colonel Hulse on whether Lieutenant Jensen had performed acts of gallantry, particularly in relation to the decision to stay and fight. Lieutenant Colonel Hulse said that Lieutenant Jensen ‘could see that he had lots of wounded on the ground, and he realised that they were so badly wounded that he didn't have enough people to carry them out and he didn't want to leave them behind’.³⁶ He said that ‘in itself is a courageous way to look at things.’ He said ‘when he realised that he had mortars, and ammunition, and if he abandoned those, that's a free gift to the enemy; another reason for him to stay’. He said that Lieutenant Jensen was confident that the men had some protection and because of this and the fact that the enemy were out and exposed on the ground, the mortar line could probably fight and defend themselves.

51. Lieutenant Colonel Hulse said that Lieutenant Jensen’s ‘thought processes were such that he was coolly and calmly evaluating and assessing the dire straits he was in,

³⁴ Lieutenant Colonel G. Hulse, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.18)

³⁵ Lieutenant Colonel G. Hulse, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.23)

³⁶ Lieutenant Colonel G. Hulse, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.24)

and coming up with reasons as to why he should stay and fight, rather than surrender or run away.’ He said that in his opinion ‘this is no ordinary guy - this is a fellow who decided to stick with it, his own personal safety went out the window, he was thinking about his men and thinking about his responsibility to the mortars and the ammunition that could have been free-gifted, had he run away’. Lieutenant Colonel Hulse said ‘this reinforces my view that we have a very special person who, given extraordinary circumstances came out with distinguished conduct’.

The Defence Submission

52. **General.** As previously stated, the decision to deny the award of the Distinguished Service Cross to Lieutenant Jensen was made by the Chief of Army on 30 October 2019. He advised Lieutenant Colonel Hulse that he could ‘not find evidence to support a conclusion that maladministration has occurred in this instance’ and in the absence of new evidence he was ‘unable to support the retrospective awarding of the Distinguished Service Cross to Lieutenant Jensen’.³⁷

53. On 17 March 2020, the Directorate of Honours and Awards provided the Defence submission on behalf of Defence.³⁸ The Defence submission did not contain a merits review and concluded that ‘no evidence was found suggesting that Lieutenant Jensen was nominated for an award’ and ‘further, no maladministration or compelling new evidence was found that led Defence to conduct a merit review’. The submission recommended that the decision by Chief of Army to not support the award of the Distinguished Service Cross be affirmed.

54. **Defence’s Submissions at the Hearing.** The Director, Ms Cole made submissions at the hearing on behalf of Defence. She said that after receiving the Tribunal’s request for a report and reasons, the Directorate re-examined available files and documents.³⁹ She said this ‘review’ found there was no evidence of maladministration in relation to considering Lieutenant Jensen for an award nomination, nor was any compelling new evidence found in relation to his service. She said that ‘in accordance with Defence policy, if thresholds are not met, then a review is not to continue and the Commander’s decision at the time is to be upheld’. She said that those thresholds were not met in this matter.

55. Ms Cole said that ‘in this particular case, the absence of a nomination is not considered maladministration’.⁴⁰ She said that at the time the Commanding Officer was aware of the actions of Lieutenant Jensen and knew the process on how

³⁷ Chief of Army letter to Lieutenant Colonel Hulse OCA/OUT/2019/BQ6814642 dated 30 October 2019.

³⁸ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2020/0010 dated 17 March 2020.

³⁹ Ms P. Cole, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.42)

⁴⁰ Ibid.

nominations were to be made. She said it was therefore reasonable to conclude that there was due process provided to those engaged in the actions.

56. Ms Cole said:

maintaining the integrity of the Australian Defence Force system of honours and awards is an important responsibility. It is based on the recognition of the highest levels of service and strives for consistency and accuracy, in consideration of each application. Like all forms of recognition, it remains a subjective process. It's the responsibility of the chain of command to make a nomination within the context of the operational conflict. Further, that nomination must be subject to any orders instructions and directives of the day.

Where this process and/or a legal requirement has been followed, Defence considers it appropriate to rely on judgments and views of the chain of command at the time as they would have been in the best place to make a decision.

Defence maintains its position because we believe that lawful and administratively correct decisions made by the chain of command should be upheld. Where there is evidence to the contrary, a Defence Historical Honours Review Board undertakes a further review of the actions of the individual. This has resulted in Defence recommending these individuals for respective honours.

Regardless of the calibre of actions, not every action or every person can be recognised with an honour and award although there are many potentially well-deserving of this. While acknowledging the many brave soldiers and officers who fought in Vietnam, the honours and awards system was not designed to recognise all of them.⁴¹

57. In relation to the nomination for a Distinguished Service Cross, the Tribunal asked that Defence provide a view on what it considered to be ‘distinguished command and distinguished leadership’. Defence stated that there were no definitions and no guidance had been issued.⁴² The Tribunal noted that the applicant had indicated that Lieutenant Jensen was the second-in-command of the platoon and the actual platoon commander was not present during the action. The applicant therefore considered that Lieutenant Jensen was in a command position – commanding the mortar line. The Tribunal asked Defence for their view in relation to what constitutes being in command.

⁴¹ Ms P. Cole, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.43)

⁴² Ms P. Cole, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.55)

58. Defence took the question on notice and on 1 July 2020 provided a response.⁴³ Defence said that for the purposes of the consideration of a distinguished service decoration, the member's entire deployment/rotation is normally considered rather than actions in a single action or battle. Defence stated that:

... on 13 May 1968 the then Lieutenant Jensen held the appointment of Second-in-Command, 1 RAR Mortar Platoon at Fire Support Base Coral. Applying the principles within the ADDP 00.1 Command and Control and 00.6 Leadership, command is held by a commander, and in this case, it would be the platoon commander that held the position of command.

On this basis, Defence does not agree that Jensen was in command during the Battle of Fire Support Base Coral.

59. The Tribunal noted that Defence 'applied the principles' within ADDP 00.1; yet the publication actually has a definition of command:

The authority that a commander in the military service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organising, directing, coordinating and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale and discipline of assigned personnel.⁴⁴

60. In relation to 'distinguished command and leadership' Defence stated that it considers this to be:

the skillful application of leadership over others in the most difficult of circumstances where the outcome was undeniably successful and of a higher standard than that expected of others in similar circumstances.

61. At the hearing Ms Cole acknowledged the evidence provided by Colonel Bindley that he had in fact drafted a nomination for a gallantry award for Lieutenant Jensen shortly after the action. However, she indicated that this was the first time she had been made aware of such a nomination. The Tribunal asked whether Defence would consider this to be new evidence. Defence sought leave to consider that question and seek clarification from Colonel Bindley.

⁴³ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2020/0043 dated 1 July 2020.

⁴⁴ Australian Defence Doctrine Publication (ADDP) 00.1 – Command and Control dated 17 May 2009, Paragraph 1.4

62. On 4 August 2020 Defence forwarded a statement it had received from Colonel Bindley in response to questions it had sent to him.⁴⁵ Defence said:

Having read Colonel Bindley's response, Defence does not question the actions taken by Colonel Bindley in his account of nominating Lieutenant Colonel Jensen for recognition of his actions during the Battle of Fire Support Base Coral. Colonel Bindley's response confirms Defence's view that Lieutenant Colonel Jensen's actions were considered by the chain of command at the time. For reasons unknown, Lieutenant Colonel Jensen's chain of command appears not to have supported the nomination.

There were, however, well-established policies and processes in place, and there is no evidence to suggest that these would not have been followed by the relevant decision-makers in considering Lieutenant Colonel Jensen's nomination. In the absence of anything to the contrary, Defence does not believe it is in a position to find that maladministration occurred with the original decision, or that compelling new evidence not available to the original decision makers has subsequently been made available.

63. Defence stated that its 'position remained that Lieutenant Colonel Jensen is not recommended for a retrospective honour'.

Tribunal Consideration

64. **General.** The Tribunal is required to review decisions 'on the merits' and this requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.⁴⁶ The merits review necessitates consideration of the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the original decision-maker. In making its decision, the Tribunal considers afresh the relevant facts, law and policy.⁴⁷ The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof, and there is no presumption that the decision was correct.⁴⁸ The Tribunal is bound to make what it regards as the 'correct and preferable' decision.

65. **Conduct of the Merits Review.** The Tribunal noted that the Respondent's reluctance to conduct a merits review was based upon a 'Defence policy' that in the absence of evidence of maladministration or compelling new evidence, the Commander's decision at the time was to be upheld. At the hearing the Director

⁴⁵ Email from Assistant Director Policy and Tribunal Team DH&A to the Tribunal dated 4 August 2020.

⁴⁶ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2.

⁴⁷ Pearson, Linda, "Merit Review Tribunals", in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68.

⁴⁸ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

indicated that this was ‘a policy framework’ that was under development based upon a ‘directive’. This directive was not able to be provided by Defence.⁴⁹

66. The Tribunal acknowledges that there is no express legislative requirement for a merits review by the Respondent, but finds it difficult to understand how a conclusion can be reached about the appropriateness of an award without a merits review being undertaken. Furthermore, it seemed futile to have responded to the initial application seeking that Lieutenant Colonel Hulse clarify the award he was seeking, and then refuse the application without conducting a merits review, relying upon a ‘developing policy’ as the basis for refusal.

67. In relation to new evidence, the Tribunal disagreed with the Defence view regarding the evidence produced by Colonel Bindley. In the Tribunal’s view, this was compelling new evidence that a gallantry nomination had been made by Lieutenant Jensen’s Company Commander in 1968.

68. Further, the Tribunal’s own research during the merits review revealed that only one immediate nomination was made after the battle and for an action on 14 May 1968. All other nominations for honours were made at the end of the tour by the Commanding Officer. No nominations were made or individuals cited for actions on 13 May 1968. Defence’s assertion that Lieutenant Jensen’s actions were considered by the chain of command at the time and ‘appear not’ to have been supported is purely speculative.

69. At the very least Colonel Bindley’s evidence that he had submitted a nomination for a gallantry award for Lieutenant Jensen should have negated the Defence position that ‘in this particular case, the absence of a nomination is not considered maladministration’. There was clearly evidence before Defence that a nomination was submitted in 1968 and no evidence of what had become of that nomination.

70. In the Tribunal’s view, there was a strong possibility that end of tour nominations were affected by the quota at the time. In forming this view the Tribunal noted that many of the Commanding Officer’s end of tour nominations were downgraded or altered at Task Force or Command level, potentially to accord with the quota which was being applied to what was arguably one of the busiest periods of combat during the entire conflict.

71. There is also clear evidence, albeit many years afterwards, that Colonel Bennett was aware of the significance of Lieutenant Jensen’s actions. The Tribunal considered that the Bindley evidence should have been considered to be compelling new evidence at least in regard to process and potentially gallantry.

⁴⁹ Ms P. Cole, Oral Submission, Public Hearing, Canberra, 18 June 2020 (Transcript P.44)

72. In any case, the Tribunal is bound by the Act to conduct a review of a reviewable decision relating to a defence honour and may make any recommendations that it considers appropriate.⁵⁰ That review in the form of a merits review of Lieutenant Jensen's actions follows.

73. **Distinguished Service or Gallantry.** The Tribunal noted that Lieutenant Colonel Hulse's original application sought recognition by way of 'an appropriate Australian Defence Force decoration befitting of the personal courage, leadership and dedication to duty in combat that Lieutenant Jensen displayed on 13 May 1968'.⁵¹ It was only at the insistence of Defence that he decided to nominate for the Distinguished Service Cross and his subsequent nomination did not address the eligibility criteria for that particular award.

74. Noting that the original application sought 'recognition' and having considered all of the evidence and the material placed before it, the Tribunal decided that it would first consider Lieutenant Jensen's actions against the Gallantry Decorations Regulations. In making this decision the Tribunal gave significant weight to the fact that new evidence pointed to Lieutenant Jensen having been previously nominated for his gallantry on 13 May 1968. The Tribunal decided that if it were to find that his actions were not gallant, it would then move to an assessment of whether his service was distinguished.

Gallantry Assessment

75. **Contemporary Gallantry Awards.** Australian service personnel received honours and awards under the Imperial system until February 1975 when the Government introduced the Australian system. The two systems – the Imperial and the Australian; then operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards.⁵² This means that only contemporary decorations may be considered. The eligibility criteria for gallantry awards in the Australian system are governed by Gallantry Decorations Regulations.⁵³

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

'according recognition to members of the Defence Force and certain other persons who perform acts of gallantry in action.'

⁵⁰ *Defence Act 1903* Part VIIIIC, Division 3, Section 110VB (1)

⁵¹ Lieutenant Colonel Hulse letter to Chief of Army dated 30 June 2017.

⁵² Prime Minister of Australia Media Release 111/92 dated 5 October 1992.

⁵³ *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991.

77. The honours are governed by Regulations set out in the Schedule, as amended in 1996:

...

Conditions for award of the decorations

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

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

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

3A. *A decoration referred to in regulation 3 may be awarded for an act of a kind mentioned in relation to the particular decoration, although the act did not occur in action, if it occurred in circumstances similar to armed combat or actual operations and those concerned were deployed under military command.*

...

Making of awards

7. *Awards of a decoration shall be made by the Governor-General on the recommendation of the Minister.*⁵⁴

78. **What is Gallantry?** The Tribunal noted that all the gallantry decorations accord recognition for individuals ‘who perform acts of gallantry in action’. Whilst ‘in action’ is a relatively straight forward concept, ‘gallantry’ is an abstract term, which is not defined in the Regulations. Various dictionary definitions such as ‘dashing courage; heroic bravery’;⁵⁵ and ‘courageous behaviour, especially in battle’;⁵⁶ are largely circuitous and unhelpful. Some countries have attempted to differentiate between ‘bravery’ and ‘gallantry’; defining the later as recognition of military personnel who carry out acts which put their lives at risk while involved in operational service; whilst ‘bravery’ is defined as saving or attempting to save the life of another person in the course of which they place their own life at risk.⁵⁷ Again this is largely unhelpful in defining gallantry in the context of the Australian Honours and Awards system.

79. The Tribunal considered that there is an expectation that all soldiers in battle conducting themselves in accordance with their training, will be acting bravely. The Tribunal considered that gallantry requires a higher standard of conduct than bravery and usually a special and additional element of courage, fearlessness, daring or heroism

⁵⁴ *Commonwealth of Australia Gazette No. S420 – Amendment of the Gallantry Decorations Regulations* - dated 6 November 1996.

⁵⁵ The Macquarie Dictionary on-line accessed 8 August 2020.

⁵⁶ The Oxford Dictionary on-line accessed 8 August 2020.

⁵⁷ <http://medals.nzdf.mil.nz/category/d/index.html>.

will have been demonstrated. What amounts to an ‘act of gallantry’, necessarily varies according to the individual circumstances of each action, and depending on many factors, including the level of threat, the person’s training, role and responsibility, the risk to the individual and/or the group, and the consequences of undertaking, or not undertaking, the particular act.

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

81. **Summary of Lieutenant Jensen’s Actions.** There are numerous accounts of the action in various publications and from witnesses as described in the application and summarised earlier in this report. The actions of Lieutenant Jensen are not in dispute however where there are inconsistencies, the Tribunal preferred Lieutenant Jensen’s personal oral evidence, supported by the written evidence of the eye witnesses.

82. **Findings in Relation to Lieutenant Jensen’s Actions.** Having reviewed the evidence, the Tribunal was reasonably satisfied that the following facts are established relating to Lieutenant Jensen’s actions on 13 May 1968:

- a. Lieutenant Jensen was the second-in-command of the 1st Battalion’s mortar platoon and in that role, commanded the mortar line. He was trained to perform that role.
- b. The mortar line was attacked by a numerically vastly superior force and was totally overrun. The soldiers were in close combat with the enemy for at least one hour and suffered serious casualties and a number killed in action.
- c. Lieutenant Jensen was personally involved in close combat and was in the middle of the attack performing not only as the commander on the ground but also as a rifleman. He personally saved one of his wounded men during this close combat.
- d. The mortar line was faced with annihilation and, with enemy in his pits, Lieutenant Jensen took the decision and accepted the risk to call direct and indirect fire onto his own position.
- e. Lieutenant Jensen made a deliberate decision to stay and fight under extreme threat rather than withdraw and give up his weapons and equipment and leave his wounded behind.

f. Lieutenant Jensen disregarded his personal safety and calmly relayed progress to his superiors and directed the fire of his soldiers, while adjusting indirect and direct fire onto his own position.

g. The enemy were eventually repelled and withdrew having suffered significant casualties.

83. **Was Lieutenant Jensen Gallant?** To be eligible for an Australian gallantry award, Lieutenant Jensen's actions would need to demonstrate that he had performed 'acts of gallantry in action'.⁵⁸ 'In action' is usually a relatively straight forward concept involving armed conflict in close proximity to or under the fire of an adversary. In this matter, the Tribunal was satisfied that Lieutenant Jensen, for the purposes of the Gallantry Regulations was 'in action'.

84. The Tribunal reviewed Lieutenant Jensen's actions against the previously stated factors common in acts of gallantry. The Tribunal formed the view that every soldier in the mortar line on 13 May 1968 was personally under extreme threat. With the enemy having overrun them and being inside the perimeter, the circumstances were dire. While the infantry is primarily trained for close combat, the probability of annihilation had the potential to cause a rout if not for Lieutenant Jensen's decision to stay and fight.

85. The Tribunal was of the view that Lieutenant Jensen displayed a special and additional element of courage when he decided to call fire onto his own position and then showed fearlessness when he continued to involve himself in the combat whilst that fire was falling. The Tribunal was of the view that the consequences of Lieutenant Jensen not acting as he did may have resulted in significantly more casualties.

86. **Finding in Relation to Gallantry.** Having considered the facts and reviewed Lieutenant Jensen's actions against the previously stated factors common in acts of gallantry, the Tribunal finds that for the purposes of the Gallantry Decorations Regulations, he did perform acts of gallantry in action on 13 May 1968.

Consideration of the Appropriate Recognition

87. Having found that Lieutenant Jensen performed acts of gallantry in action, the Tribunal turned to an assessment of his actions against the eligibility criteria for Australian Gallantry Decorations.

88. **The Star of Gallantry.** The Tribunal noted that the Star of Gallantry 'shall be awarded only for acts of great heroism or conspicuous gallantry in action in circumstances of great peril'.

⁵⁸ *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991.

89. In *Hanuszewicz and the Department of Defence re Cameron*, the Tribunal considered that ‘circumstances of great peril’ are likely to occur when both the individual and the group are threatened to such an extent that there is a distinct probability that the group would be overwhelmed by the enemy.⁵⁹ The Tribunal was satisfied that Lieutenant Jensen and his men had been overrun by a significantly superior force and were involved in desperate hand to hand combat at close quarters.

90. Witnesses described the situation as dire, perilous and there was the real potential of annihilation. Additionally, there was the prospect that they would be killed or injured by their own fire support. There was little cover and visibility was limited, confusion reigned and there was uncertainty and fear of the unknown. Accordingly, the Tribunal finds that Lieutenant Jensen was in circumstances of great peril.

91. In relation to whether Lieutenant Jensen’s actions during the engagement could be considered to be acts of great heroism, the Tribunal noted that none of the evidence suggested such heroism. While Lieutenant Jensen remained calm, was decisive and issued clear orders and instructions; these actions could not be considered by the Tribunal to be acts of ‘great heroism’. He demonstrated outstanding control and excellent skill in adjusting fire. He made a courageous decision to accept direct fire onto his own position. He also displayed well advanced basic infantry skills. His decision to stay and fight despite the perilous circumstances was in the Tribunal’s view a decision which highlighted his leadership qualities and, whilst it may be seen to be an heroic action or decision, the Tribunal could not be reasonably satisfied that it amounted to ‘great’ heroism.

92. The Tribunal was of the view that the most significant act of gallantry was the calling of fire by Lieutenant Jensen onto his own position. It is more likely than not that the direct and indirect fire onto the enemy ultimately caused their assault to falter leading to their withdrawal. As previously described, the act of calling fire onto his own position was undeniably gallant. The question for the Tribunal is whether the Tribunal could be reasonably satisfied that the act was one of ‘conspicuous gallantry’.

93. The Tribunal noted that all infantry officers are trained in all-arms call for fire and are expected as part of their training to be able to adjust such fire and, in the most dire of circumstances, to be able to call it onto their own position. Indeed, for a mortar qualified officer such as Lieutenant Jensen, it is expected that he would be able to so with relative accuracy. This was an occasion where the Tribunal considered that Lieutenant Jensen was gallantly doing what he was trained to do. Even though he was doing what was expected of him, in the dire circumstances which he faced, could it be considered to be ‘conspicuous’ gallantry?

⁵⁹ *Hanuszewicz and the Department of Defence re Cameron* [2019] DHAAT 08 (23 May 2019)

94. Dictionaries define the word ‘conspicuous’ as ‘visible’ or ‘readily attracting attention’ or ‘notice’. In the Tribunal’s view this understates the level of gallantry required for a Star of Gallantry. ‘Conspicuous gallantry’ is an alternative to ‘great heroism’ in the Regulations for the award and thus must be something of greater weight, consequence or significance. ‘Conspicuous’ in this context must be seen as outstanding, prominent, noteworthy, eminent or distinguished. On the other hand it must be less than ‘most conspicuous gallantry’, one of the tests for the Victoria Cross for Australia.⁶⁰

95. As set out above the most significant act of gallantry by Lieutenant Jensen was the calling of fire onto his own position. It is likely that the direct and indirect fire onto the enemy ultimately caused their assault to falter leading to their withdrawal. Having regard to the perilous circumstances facing the mortar platoon, Lieutenant Jensen’s decision to call fire onto his own position was a necessary action, brought about by the mortar line being over-run and the platoon on the cusp of annihilation. The Tribunal considered that in order for an act of gallantry to meet the test of being ‘outstanding, prominent, noteworthy, eminent or distinguished’, the act would be one beyond what is necessary in the circumstances, even where those circumstances are perilous. The Tribunal was therefore not persuaded that this act, while undeniably gallant, was ‘conspicuous’ in terms of the Star of Gallantry Regulations.

96. **Finding in Relation to the Star of Gallantry.** The Tribunal is reasonably satisfied that for the purposes of the Gallantry Decorations Regulations, Lieutenant Jensen was in circumstances of great peril but did not perform acts of great heroism or conspicuous gallantry. He therefore does not satisfy the eligibility criteria for the award of the Star of Gallantry.

97. **The Medal for Gallantry.** The Tribunal noted that the Medal for Gallantry ‘shall be awarded only for acts of gallantry in action in hazardous circumstances.’ The Tribunal noted that Colonel Bindley’s evidence was that he and the Adjutant at the time had agreed that an appropriate level of award for Lieutenant Jensen should have been ‘at the very least a Military Cross’. The Tribunal was satisfied that this level of award was commensurate with the Medal for Gallantry and also aligned with the level of nominations made by the Commanding Officer in November 1968 for other junior officers who had performed acts of gallantry (five nominated for the Military Cross, three were downgraded to Mention in Despatches).⁶¹

98. The Tribunal has found that Lieutenant Jensen performed an act of gallantry in action. It therefore remains that, should he be found to have been in ‘hazardous

⁶⁰ *Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations* – dated 4 February 1991.

⁶¹ AWM Excerpt 119 603 Part 1, containing original Recommendations for Honours or Awards for 1 RAR officers – 2LT Salter, MC; 2LT Weekes, MC; 2LT Bowcock, MC to MID; 2LT Sutton, MC to MID and 2LT Molnar, MC to MID.

circumstances’, he would meet the eligibility criteria for the award of the Medal for Gallantry.

99. Hazardous circumstances’ is not defined in the Regulations. In *Soldier P (re Soldier J) and the Department of Defence*, the Tribunal considered that the term ‘hazardous circumstances’ was intended to take into account the particular circumstances of a soldier in action and required that the hazardous circumstances be considered in the context of the relevant combat situation.⁶² This Tribunal agrees with this interpretation.

100. The Tribunal in *Reid and the Department of Defence* found that Private Reid, as a platoon medical assistant, was in hazardous circumstances when he tended casualties whilst exposed to enemy fire before, during and after treating the wounded and that he was personally in danger.⁶³

101. The Tribunal has found that Lieutenant Jensen was in circumstances of great peril because he and his men had been overrun by a significantly superior force and were involved in desperate hand to hand combat at close quarters. His situation was described by witnesses as dire, perilous and there was the real potential of annihilation. The Tribunal was therefore satisfied that Lieutenant Jensen was also in hazardous circumstances during the attack on his position on 13 May 1968.

102. **Finding in Relation to the Medal for Gallantry.** The Tribunal was satisfied that for the purposes of the Gallantry Decorations Regulations, Lieutenant Jensen performed acts of gallantry in action in hazardous circumstances as the commander of the 1st Battalion’s mortar line on 13 May 1968.

103. The Tribunal therefore finds that Lieutenant Jensen’s actions on 13 May 1968 meet the eligibility criteria for the award of the Medal for Gallantry.

Distinguished Service Assessment

104. Having found that Lieutenant Jensen was eligible for the award of the Medal for Gallantry, it was not necessary for the Tribunal to continue to assess his eligibility for the Distinguished Service Cross. However, for completeness, and recognising that the application was in relation to that award, the Tribunal makes the following observations and comments.

105. **What is Distinguished Service in Warlike Operations?** The Tribunal notes that Defence does not have guidance as to what constitutes distinguished service and at hearing, was unable to assist the Tribunal in establishing how it makes an assessment

⁶² *Soldier P and the Department of Defence* [2014] DHAAT 27 (4 July 2014).

⁶³ *Reid and the Department of Defence* [2017] DHAAT 02 (30 November 2017).

as to the merits of nominations despite frequently considering and making recommendations for these awards.

106. The Tribunal noted that distinguished service decorations accord recognition to members of the Defence Force and certain other persons for distinguished command and leadership, distinguished leadership, or distinguished performance of duties, in warlike operations.

107. The Tribunal considers that the first step in determining whether an individual's service is distinguished is to define what that service was. The Tribunal considers that 'service' in warlike operations may relate to the individual's appointment, role or posting, or it may relate to a period of time, such as a particular operation, during which an individual's achievements were worthy of recognition. It is unlikely that such service would be for a single action or act, but rather for a specific duration, although that duration may vary according to the circumstances. Any assessment of performance will relate to the entirety of the period involved.

108. The Tribunal further considered that for service to be 'distinguished', the individual in that role or appointment would have successfully discharged duties which were additional or superior to those normally pertaining to the individual's rank and employment.

109. For distinguished command, the Tribunal considered that the individual must be in a command role, regardless of rank. The individual may not be in a formal command appointment, but may be eligible as the result of having had to exercise *de facto* command, particularly where that command involves a greater degree of independent decision making than would normally be expected of a member of the rank held. In any case, for command to be distinguished, the individual must have demonstrated the ability to effectively deal with complexity, difficult coordination challenges and multiple superiors, influencers and subordinates.

110. For distinguished leadership, an individual must be in a position where leadership is required and his or her leadership must be demonstrably superior to others with similar employment, responsibility and rank. Such leadership should have been evident for the period under consideration. Whilst definitions of leadership abound, the Tribunal was satisfied that the common qualities found in successful operational leaders included example, judgement, courage and willpower. Successful leadership is not a product of rank or responsibility, the most junior sailor, soldier or airman can display 'distinguished leadership' depending on the circumstances.

111. **Was Lieutenant Jensen's Service Distinguished?** The Tribunal considered that Lieutenant Jensen's service was distinguished. He successfully discharged his duties as the officer commanding the mortar line in unprecedented circumstances and performed those duties in a superior manner in comparison to those normally pertaining to a junior officer in combat. The Tribunal also noted that there was evidence that

Lieutenant Jensen's distinguished service was not just confined to the one action. He is said to have performed to a superior level in re-constituting his mortar line and commanding it on 16 May 1968. He later moved to command a rifle platoon and again is said to have distinguished himself.

112. For the purposes of the Distinguished Service Decorations, the Tribunal was of the view that it could be seen that Lieutenant Jensen's distinguished service encompassed the entirety of his deployment as a junior commander in 1968 and was not just confined to his actions on 13 May 1968.

113. **Distinguished Command.** The Tribunal acknowledges that Lieutenant Jensen was not the Mortar Platoon Commander. However, Defence's simplistic view that command is 'held by a commander' fails to understand the reality of the operational employment of a mortar platoon and is inconsistent with the specific definition in the publication that Defence purported to rely upon to establish 'principles' in order to define command.⁶⁴ This definition would suggest that Lieutenant Jensen was in command by virtue of his 'assignment' and accordingly he had the authority and responsibility to 'plan, organise, direct, coordinate and control' the mortar line and its personnel whilst deployed.

114. The Tribunal was also aware that the platoon commander on operations is not located with the mortar platoon. He is located in the Battalion command post with the Commanding Officer and travels with him. He has no interaction with the mortar line other than to process calls for fire and clearance. The mortar line is commanded by what today is known as the Mortar Line Officer. He is responsible for their positioning, defence, operations and the leadership of the soldiers. The Tribunal was therefore satisfied that Lieutenant Jensen exercised de facto command of the mortar line and was in command by virtue of his assignment.

115. The Tribunal was satisfied that Lieutenant Jensen's command of the mortar line was distinguished. In perilous circumstances, he was able to effectively deal with complexity, coordination multiple direct and indirect fire assets and report calmly and efficiently to his superiors. His command of his soldiers was swift and precise.

116. **Distinguished Leadership.** There appears to be no dispute that Lieutenant Jensen's leadership was distinguished. Indeed, Defence's own definition; 'the skilfull (*sic*) application of leadership over others in the most difficult of circumstances' appears to be precisely what he was providing to his soldiers. The Tribunal was satisfied that Lieutenant Jensen's leadership was demonstrably superior to others with similar employment, responsibility and rank such as a standard rifle platoon commander. In the most perilous of circumstances he demonstrated sound judgement, courage and determination and provided an inspirational example for his subordinates.

⁶⁴ Australian Defence Doctrine Publication (ADDP) 00.1 – Command and Control dated 17 May 2009, Paragraph 1.4.

In Lieutenant Colonel Hulse's words, his 'men believed in him and when he made the call to fight, they followed him'.

Conclusion

117. The Tribunal finds that Lieutenant A.H. Jensen performed acts of gallantry in action in hazardous circumstances as the commander of the 1st Battalion's mortar line on 13 May 1968 and that his actions meet the eligibility criteria for the award of the Medal for Gallantry.

TRIBUNAL DECISION

118. Having reviewed the decision by the Chief of the Army of 30 October 2019 to not support the award of the Distinguished Service Cross to Lieutenant A.H. Jensen for his actions on 13 May 1968, the Tribunal decided to recommend to the Minister for Personnel that he recommend to the Governor-General that Lieutenant A.H. Jensen be awarded the Medal for Gallantry for acts of gallantry in action in hazardous circumstances as the officer commanding the 1st Battalion, the Royal Australian Regiment's mortar line during the Battle for Fire Support Base Coral in Vietnam on 13 May 1968.