



Australian Government

Defence Honours and Awards Appeals Tribunal

Hulse and the Department of Defence re: Kemp - DHAAT 05 (28 May 2021)

File Number(s)

Re: **Lieutenant Colonel George Hulse, OAM (Retd) on behalf of
Colonel John Kemp AM (Retd)**
Applicant

And: **Department of Defence**
Respondent

Tribunal

Air Vice-Marshal John Quaipe, AM (Retd) Presiding Member
Major General Simone Wilkie, AO (Retd)
Mr Graham Mowbray

Hearing Date 24 February 2021

DECISION

On 28 May 2021, having reviewed the decision by the Chief of Army of 26 February 2020 to not support the award of the Distinguished Service Cross to Colonel John Kemp AM (Retd) for his service in Vietnam, the Tribunal decided to recommend to the Minister for Defence that the decision by the Chief of Army be set aside and that Colonel Kemp be awarded the Distinguished Service Cross for his command and leadership of 1st Field Squadron Group, Vietnam, between 1 November 1967 and 12 November 1968.

CATCHWORDS

DEFENCE HONOUR – *Distinguished Service Decorations – Distinguished Service Cross – eligibility criteria – 1st Field Squadron Group – Fire Support Base Coral - South Vietnam – MID nomination.*

LEGISLATION

*Defence Act 1903 – Part VIIIC - Sections 110T, 110V(1), 110VB(1), 110VB(6).
Defence Regulation 2016, Section 35.*

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

Commonwealth of Australia Gazette No S18 – Amendment of the Distinguished Service Decorations Regulations – dated 22 February 2012.

REASONS FOR DECISION

Introduction

1. The applicant, Lieutenant Colonel George Hulse OAM (Retd) seeks review of a decision by the Chief of Army, Lieutenant General Rick Burr AO DSC MVO, of 26 February 2020, to not recommend the award of the Distinguished Service Cross to Colonel John Howard Kemp for his service in Vietnam.
2. On 30 June 2017, the applicant wrote to the then Chief of Army, Lieutenant General Angus Campbell AO DSC, seeking decorations for nine Army personnel who, in his view, *‘contributed service to the Army in a manner which was above and beyond that expected of soldiers in combat’*. On 22 June 2018, having received no response to his initial letter, Lieutenant Colonel Hulse wrote to the Tribunal seeking a review of what he deemed to be an *‘unwritten rejection’* of his application. The Tribunal has no power to review a matter that has not been the subject of a decision in response to an application for an honour or award.
3. On 3 July 2018, Brigadier Leigh Wilton AM, Director General of Personnel - Army, wrote to Lieutenant Colonel Hulse seeking clarification of the award sought for each member. On 12 November 2018, Lieutenant Colonel Hulse replied to Brigadier Wilton recommending that Colonel Kemp be awarded the Distinguished Service Cross for his *‘exemplary leadership and personal gallantry in action under circumstances of peril on 16 May and 27 May 1968 and for his exemplary leadership during the period 1 November 1967 to 11 November 1968’*.
4. On 26 February 2020, Lieutenant General Burr responded to Lieutenant Colonel Hulse stating that the assessment methodology and definitions used by Army require new submissions (for “retrospective” honours) to provide evidence of maladministration and/or compelling new evidence. Lieutenant General Burr’s letter went on to explain that there was no evidence to substantiate that Major Kemp¹ had been previously nominated for an award or identified for the Vietnam End of War list. The letter also concluded that Lieutenant Colonel Hulse’s submission included no additional or new evidence. On this basis, Lieutenant General Burr decided he could not support the awarding of the Distinguished Service Cross.
5. On 13 April 2020, Lieutenant Colonel Hulse applied to the Tribunal seeking review of Lieutenant General Burr’s decision. Lieutenant Colonel Hulse provided additional information on 29 May 2020, which was subsequently provided to Defence. On 8 June 2020, Lieutenant Colonel Hulse provided a witness statement from Major Rod Palmer (Retd) which was also provided to Defence.

¹ Colonel Kemp’s rank at the time of his Vietnam service was Major.

Tribunal jurisdiction and decision under review

6. 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 of the Regulation. Included in the defence honours at Item 5 is the Distinguished Service Cross.

7. The Tribunal was satisfied that Lieutenant Colonel Hulse's request of 30 June 2017 constituted an application as required by s110V(1)(c) of the Act. The Tribunal was satisfied that the Chief of Army's response of 26 February 2020 constituted a refusal to recommend Colonel Kemp for the Distinguished Service Cross, thus satisfying the requirements of s110V(1)(a) and (b) of the Act and constituting the *reviewable decision*.

8. The Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision in 2020, 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 recommendations regarding the decision to the Minister.

Conduct of the review

9. In accordance with the Tribunal's *Procedural Rules 2011*, the Chair wrote to the Secretary of the Department of Defence on 14 May 2020 seeking a report of the merits-based assessment of Colonel Kemp's actions against the eligibility criteria for the Distinguished Service Cross, and other germane material. On 11 August 2020, Ms Petrina Cole, Director of Honours and Awards in the Department of Defence (the Directorate) provided a report. Lieutenant Colonel Hulse provided his written response to the Defence Report on 21 September 2020.

10. A public hearing was conducted in Canberra on 24 February 2021. Lieutenant Colonel Hulse and Colonel Kemp were present and gave evidence. The Respondent was represented at the hearing by Ms Cole. Colonel Bronwyn Johnstone (Director Personnel Policy, Army) and Ms Melissa Jones (Defence People Group Special Counsel) also represented Defence.

Colonel Kemp's service

11. Colonel Kemp enlisted in the Australian Army on 30 January 1954. He was temporarily appointed as a Major on 3 October 1966 with a permanent appointment to that rank following on 11 December 1967. Colonel Kemp was posted as a Major to 1st Field Squadron Group on 1 November 1967. His overseas service included service in South Vietnam from 1 November 1967 to 12 November 1968. He discharged from the Army on 29 January 1985, having reached the rank of Colonel.

12. For his service, Colonel Kemp has received the following:

Member of the Order of Australia
Australian Active Service Medal 1945-1975 with clasp 'VIETNAM'
Vietnam Medal
Australian Service Medal 1945-75 with clasp 'PNG'
Queen Elizabeth II Silver Jubilee Medal
Defence Force Service Medal with First, Second and Third Clasps
National Medal with First Clasp
Australian Defence Medal
Republic of Vietnam Campaign Medal
Unit Citation for Gallantry (Coral and Balmoral)

Lieutenant Colonel Hulse's written submission

13. At the time of the service in consideration, the Applicant, Lieutenant Colonel Hulse (then a Lieutenant) served as a subordinate Troop Commander to (then) Major Kemp.² Between 1 November 1967 and 12 November 1968, Major Kemp was commander of the 1st Field Squadron Group, Royal Australian Engineers (1 FD SQN GP). In his submission to the Tribunal, Lieutenant Colonel Hulse has cited three aspects of Major Kemp's Vietnam service over the period.

14. Between 13 May 1968 and 6 June 1968, 1 FD SQN GP was engaged on Operation Toan Thang in both Fire Support Base (FSB) Coral and FSB Balmoral. The prime task of 1 FD SQN GP was to provide intimate combat engineer support to two infantry battalions, tank, cavalry and APC Squadrons and general engineer support to artillery, signals, task force headquarters and logistics elements forward deployed to the FSBs. 1 FD SQN GP was also expected to contribute to perimeter defence. The Group's normal roles included detection and clearance of mines and booby traps, search and destroy operations in enemy bunkers and tunnel systems, construction of roads and the clearance of helicopter landing pads, and the provision of protected and hardened positions for the Task Force control elements.

15. Lieutenant Colonel Hulse told the Tribunal that in the deployment to FSB Coral, Major Kemp had little time to prepare his unit for what would become primarily an infantry role. There was no reconnaissance, flanking unit coordination, work prioritisation or pre-designated fields of fire assigned that would have enabled the efficient conversion of his unit from a combat support role to a combat arm. During the day of 13 May 1968, the four infantry companies of 1 RAR formed a perimeter covering over two-thirds of FSPB Coral. 1 FD SQN GP was assigned the remaining almost one third of the perimeter in the south-western segment. 1 FD SQN GP was augmented by the Assault Pioneer Platoon of 1RAR, placed under the command of Major Kemp, and two United States 'Dusters'³ filled an otherwise undefended gap between the engineers and Bravo Company 1 RAR.

² To avoid confusion, Colonel Kemp is referred to as Major Kemp for the majority of this report.

³ The 'Dusters' were armoured vehicles each armed with a pair of 40mm Bofors anti-aircraft guns mounted parallel to the ground.

16. On the night of 15/16 May 1968, Major Kemp's unit received and repelled a frontal attack from a North Vietnamese Regular Army unit. The fighting was intense. Lieutenant Colonel Hulse told the Tribunal that Major Kemp controlled his squadron by radio, combat telephone and through personal visits to his forward troops. Lieutenant Colonel Hulse highlighted Major Kemp's leadership, confidence and coolness under fire as demonstrating exemplary resilience and determination.

17. On 27 May 1968, Major Kemp was ordered to lay two defensive minefields at FSB Balmoral. Lieutenant Colonel Hulse told the Tribunal that Major Kemp entered the minefields under construction to personally confirm that specifics in the design of the minefields were being delivered. These minefields were laid in daylight, in the full view of North Vietnamese Army positions. Lieutenant Colonel Hulse has noted that Major Kemp's presence in the minefields was a reassuring sight that *'lifted the morale of every sapper engaged with the task'*.

18. Lieutenant Colonel Hulse also highlighted in his submissions Major Kemp's leadership over his entire tour of duty as he often visited his soldiers at the forward edge of the combat zone and engaged with them in such a way as to inculcate confidence and enthusiasm and pride in their unit and their work.

Lieutenant Colonel Hulse's evidence at hearing

19. Lieutenant Colonel Hulse opened his evidence by stating that he regards Colonel Kemp as the best combat commander for whom he has worked. He then went on to explain that, during 1968, at the time Major Kemp was in command, 1 FD SQN GP comprised around 450 personnel of all ranks including soldiers from the United States Corps of Engineers. He contrasted this with a normal Field Squadron that would comprise around 105 personnel of all ranks and be commanded by a Major. Lieutenant Colonel Hulse used this comparison to highlight the magnitude of the command task for the Field Squadron Group as being equivalent to a Regiment that would normally be commanded by a Lieutenant Colonel.

20. Lieutenant Colonel Hulse believes the command arrangements for the Group were vastly under-established and that the Group should have been established as a Combat Engineer Regiment or even a Combat Engineer Battalion. This under-establishment was recognised in 1972 when the establishment of a Field Engineer Regiment was authorised - just as the Corps of Engineers was about to leave Vietnam.

21. This establishment anomaly left Major Kemp, during the most intense period of operations for 1 FD SQN GP during the Vietnam War⁴ and coincidentally the period of the Group's highest manning, severely under-resourced. Lieutenant Colonel Hulse emphasised his view that this should be seen as especially noteworthy given the 'equivalent' sized infantry formations operating within the Australian Task Force were commanded at Lieutenant Colonel level with each commander supported by seven senior officers. In contrast, Major Kemp was the only officer above field-grade rank⁵ within 1 FD SQN GP.

⁴ Colonel Kemp's tour of duty in Vietnam covered the period of intense fighting associated with the Tet offensive and the battles of FSPB Coral and Balmoral.

⁵ Captain or below.

22. To illustrate the span of Major Kemp's command responsibilities, Lieutenant Colonel Hulse listed the following 1 FD SQN GP roles:

- Command, control and leadership of the Unit Combat Engineering capability providing:
 - close combat support to three infantry battalions, one tank squadron, a cavalry squadron, an armoured personnel carrier squadron, an artillery regiment of three batteries, and other combat support units;
 - protection of administrative and logistic units traversing the main supply route between Vung Tau and Nui Dat;
 - combat engineering tasks associated with the detection and clearance of land mines, booby traps, improvised explosive devices, enemy caches and stores dumps;
 - the provision of helicopter landing zones for the expedient evacuation of casualties; and
 - assistance with the recovery of friendly casualties in areas that had been attacked by enemy counter-mobility action.
- Command and control of a land clearance team whose role was to clear expansive areas of jungle to enable friendly troops to detect and repel enemy activity.
- Essential services such as the construction and maintenance of roads, bridges, helicopter landing zones, airstrips, hard-stand areas, the built environment including headquarters installations, Q-stores, catering facilities, living accommodation and sanitation facilities, quarries, timber mills, water supply, electrical energy supply to the 1st Australian Task Force (1ATF) base at Nui Dat, plus the short-notice maintenance response for any or all of these services.
- Coordination and collaboration with provincial civil engineers and the civil affairs team.
- Ongoing liaison between Australian and United States Engineer command elements at provincial and Headquarters Australian Forces - Vietnam level for all engineer projects that impacted areas under operational control other than 1ATF sources.

23. In addition to Major Kemp's extraordinary span of command, Lieutenant Colonel Hulse told the Tribunal that Major Kemp was the last commander of the 1 FD SQN GP in Vietnam to serve a twelve-month tour of duty and that officers posted to the position subsequent to Major Kemp served six-month tours.

24. Lieutenant Colonel Hulse described Major Kemp's habit of leading from the front. Major Kemp was known to personally engage the enemy, and did not shy away from danger when choosing to work with his sappers in minefields. He was prepared to demonstrate to his men that he was willing to share the risk associated with their work. Lieutenant Colonel Hulse describes the impact of Major Kemp's leadership on morale within 1 FD SQN GP as '*going through the roof.*'

25. Lieutenant Colonel Hulse's proposition was that Major Kemp was executing duties that more usually would be those of a Lieutenant Colonel. Lieutenant Colonel Hulse is of the view that Major Kemp's expansive command responsibilities were '*not even closely matched by any other Major in the Australian Defence Force involved in the Vietnam War*'. Lieutenant Colonel Hulse also made the observation that had Major Kemp actually held the rank better matched to his command, his service would likely have been recognised by the award of the Distinguished Service Order.

26. Lieutenant Colonel Hulse noted that Major Kemp was recommended by the 1st Australian Task Force Commander, Brigadier Hughes, for the Mention in Despatches (MID). Lieutenant Colonel Hulse also noted, however, that Major Kemp was 'struck off' the final list of nominees and consequently '*received no medallic recognition whatsoever for an intense, dangerous, broad-ranging and personally challenging tour of duty*.'

Major Palmer's statement

27. Major Rod Palmer (Retd) served with 1st Field Squadron, Royal Australian Engineers, from 5 February 1968 to 31 March 1969 at the rank of Captain. His statement was included with Lieutenant Colonel Hulse's submission to the Tribunal. Major Palmer described joining the squadron at the peak of the Tet offensive when most of the Australian Task Force, including 1 FD SQN GP, was deployed away from the base at Nui Dat.

28. Major Palmer drew a distinction between the size and scope of Major Kemp's responsibilities as the Officer Commanding 1 FD SQN GP with an infantry company commander's role (usually performed by a major) in an infantry battalion who '*commanded in the order of just 100 infantrymen*'. Major Palmer has detailed that all members of the Group were '*trained firstly as Infantrymen, but also in their specialist roles of carpenters, plumbers, electricians and the like, and plant operators, drivers etc.*' Major Palmer states the role of '*the Engineer Major commanding some 300+ personnel of many "trades", was far more demanding and complex than his Infantry counterpart*'.

29. Major Palmer stated there were many instances when Major Kemp was challenged in his command role with the greatest of these being the nightly attacks on his unit at FSB Coral. Major Palmer has endorsed the description of the action provided by Lieutenant Colonel Hulse and noted '*the constant display of good leadership by Major Kemp when it was needed most during those battles*'. Major Palmer also detailed the engagement of Major Kemp with his men throughout his tour as '*maintaining a high level of leadership and morale within the Unit*'.

Colonel Kemp's evidence

30. Colonel Kemp gave evidence at the hearing that covered the operations of 1 FD SQN GP whilst under his command. He commenced by endorsing Lieutenant Colonel Hulse's description of the broad and expansive nature of the Group's responsibilities.

31. Colonel Kemp stated that 1 FD SQN GP initially comprised 280 all-ranks at the commencement of his tour of duty. Between December 1967 and February 1968, the

size of the Group increased to 401 all-ranks. Colonel Kemp described the priority of their tasking being given to operations but with an ongoing requirement for his soldiers to be assigned to many base development and maintenance tasks on their return to Nui Dat. The Group also maintained a program of training for Group personnel in order to share knowledge of evolving enemy tactics and procedures.

32. Colonel Kemp described the complexity of relationships and the requirement for close liaison with the US II Field Force (Vietnam) chief engineer (a US Army colonel) and the Australian Force Vietnam chief engineer (an Australian lieutenant colonel, based in Saigon). Colonel Kemp described the disaggregated structure of the Group and the close relationships established between his combat engineer teams and their supported battalions.

33. Colonel Kemp then provided a series of examples to illustrate the diversity of 1 FD SQN GP activity. He detailed the following operations:

- **Song Rai Bridge.** A maintenance operation conducted by 1FD SGN GP to address enemy interference with minefields protecting the Song Rai bridge. The integrity of the minefields had deteriorated through the growth of vegetation and soil erosion. Two sappers were killed when their movement detonated a mine. Major Kemp personally assisted with the removal of the men's bodies from the minefield.
- **Operation Coburg.** An Australian Task Force operation to deny enemy sites with 1 FD SQN GP providing intimate support. In response to major enemy attacks against United States bases at Bien Hoa and Long Binh, the Australian Task Force established a position astride 'Route 1' blocking the major withdrawal route for enemy forces. 1 FD SQN GP was involved in a number of heavy engagements with the enemy, bunker demolition, booby-trap clearances and landing zone construction.
- **Operation Pinaroo.** A major 1ATF operation to clear enemy positions from the Long Hai hills – a heavily wooded area with rocky peaks dominating the south-eastern portion of the province. 1 FD SQN GP augmented by an assault pioneer troop was required to clear access through a vast, low-density minefield in challenging terrain. Operation Pinaroo was conducted over a period of six weeks with 126 mines or booby-traps being cleared in the initial phase. Three 1 FD SQN GP soldiers were killed in action and some 40 bomb-proof caves were discovered and cleared. The efforts of 1 FD SQN GP were specifically commended by the 1ATF Commander, Brigadier Hughes, for their work in the minefields.
- **Operation Cooktown Orchid.** A large land clearance operation in the lower reaches of the Long Hai hills. This was a month-long operation to clear 200 metre wide trails and to segment the jungle mass, provide boundaries and blocking positions, open the area for both military purposes and cultivation, provide helicopter landing zones and clear breaks separating the Long Hai hills redoubt from rice paddy areas in the lower lands.
- **Barrier minefield clearance.** A 1 FD SQN GP operation to clear a large but ineffective barrier minefield utilising a Centurion tank. Innovative techniques

were developed and trialled utilising various configurations of tank and demolition mats.

- **Coral/Balmoral.** As described by Lieutenant Colonel Hulse (*see paras 14-16*) 1 FD SQN GP was engaged with perimeter defence tasks at FSB Coral and the construction of defensive minefields at FSB Balmoral. Colonel Kemp outlined that during the day, much of his unit's effort was directed to 'bundling' artillery and mortar positions, the construction of command posts and burying enemy dead. Elements of the squadron were employed on mine clearance, field fortifications, water supply, road construction, landing zone development and clearing land to deny cover to enemy approaches.
- **Operation Toan Tang Phase 2.** Construction of a forward task force headquarters facility at Long Binh involving 110 personnel, 16 plant items and 10 tippers.
- **Operation Lyre Bird.** An extensive land clearance operation to the north of Nui Thi Vai and Nui Dinh mountains.
- **Ba Ria Bridge.** Construction of a Class 65 Double-Single Bailey Bridge crossing the Song Dinh at Ba Ria to enable tank operations in the north and north-west of the province.
- **Base Development.** Throughout and interspersed with deployed operations, any spare capacity of the Squadron Group was directed towards base development activities including:
 - facilities construction,
 - airfield and hardstand construction,
 - quarry operations,
 - water supply,
 - refrigeration repair and maintenance, and
 - the generation of electricity and its associated infrastructure.

Defence Submission

34. The Defence report submitted in response to the Tribunal's request for review of the Chief of Army's decision, states further research was conducted into Colonel Kemp's service record, supplementary material provided by Lieutenant Colonel Hulse and documents located at the Australian War Memorial. Defence also considered Major Kemp's actions against the eligibility criteria for the Distinguished Service Cross.

35. **Nomination for the MID.** The Defence review confirmed Major Kemp had been nominated for the MID for his service in Vietnam but the review had not located the nominating document. The review also noted that the nomination was unsuccessful but details of the nomination and why it was not successful were unknown. Defence advised that unsuccessful nominations were not unusual.

36. **Consideration of Major Kemp's Actions.** In considering the description of Major Kemp's actions as provided by Lieutenant Colonel Hulse, the Defence review noted the requirement that members of the Royal Australian Engineers maintain a duty to perform infantry duties when required and that, from his service record, Major Kemp had been adequately trained to undertake those duties. Considering Major Kemp's leadership, the Defence review focussed on mildly critical comments extracted from an annual performance report for a period that ended in April 1968.

37. **Distinguished Service Cross eligibility.** The Defence review concluded there was no evidence to suggest Major Kemp maintained a calm demeanour when dealing with his subordinates. The review did find documentary evidence regarding the intensity of battle at FSB Coral but insufficient evidence to indicate that Major Kemp's actions were of a higher standard than others in similar positions. Regarding Major Kemp's MID nomination, the review noted that the eligibility criteria for the Distinguished Service Cross is higher than for the MID. Finally, the Defence review took the position that commanders at the time were best placed to determine recognition and found there was no information to show that Major Kemp's command and leadership had been distinguished.

38. **Maladministration or compelling new evidence.** Having completed a very brief and far from convincing review of Major Kemp's actions against the eligibility criteria for the Distinguished Service Cross, Defence concluded that the absence of any evidence to the contrary meant the process around the MID nomination had been conducted correctly. Although unable to locate evidence regarding Major Kemp's command and leadership, the review focussed on an early performance report that was interpreted to indicate that Major Kemp's leadership required some development. Accordingly, the Defence report concluded that neither maladministration nor compelling new evidence had been identified and so the Chief of Army decision to not recommend Colonel Kemp for the Distinguished Service Cross should be affirmed.

Defence submissions at hearing

39. At the hearing, Defence was invited to consider the document nominating Major Kemp for the MID.^{6 7} This document had not been discovered during the Defence review, and was subsequently located by the Tribunal. As the nomination speaks specifically to Major Kemp's command and leadership, the Tribunal sought Defence input as to whether this evidence would change conclusions drawn regarding the absence of evidence.

40. In discussing the draft MID citation, Ms Cole observed that the current Joint Operations Command assessment process would be looking for a much broader list of achievements than had been included in the 1968 document. Although reluctant to make any judgement, the Defence representatives agreed that the level, breadth and complexity of Major Kemp's achievements, as presented to the Tribunal at the hearing, compared favourably with the level of achievement expected in current nominations. When pressed, Defence also agreed that the statements of Lieutenant Colonel Hulse and Major Palmer, and the contemporary appraisal by Brigadier Hughes in his MID

⁶ AWM103, 657, Headquarters 1 Australian Task Force (HQ1ATF) unregistered item: Recommendations (Honours and Awards) Fwd December 1968.

⁷ A copy of the MID nomination form is attached.

nomination of October 1968, did constitute evidence of Major Kemp's command and leadership.

41. Defence representatives were also invited to elaborate on the conclusion that the process for nominations was conducted correctly. Defence agreed that while it was clear that a process had been conducted, there was no evidence to support the conclusion that the process had been conducted correctly.

42. Defence was invited to elaborate on the inclusion of comments selectively extracted from Major Kemp's annual performance report covering a period prior to Operation Toan Thang and the Battles of FSB Coral and Balmoral. Ms Cole told the Tribunal that, *'while having no relevance here'*, current practice for the consideration of award nominations includes the service review of performance reports. Ms Cole was also unsure as to why a selective and partial extract had been included other than to demonstrate the detail to which Colonel Kemp's records had been examined.

Tribunal consideration

43. **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 or the process leading to it. 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. 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. The Tribunal is bound to make what it regards as the 'correct or preferable' decision.

44. **Decision under review.** As noted in paragraph 4 above, Lieutenant General Burr as the primary decision maker for Defence rejected the application on the basis that there was no maladministration and no compelling new evidence. In doing so, he purported to apply the thresholds Defence customarily applies before it will conduct a merits review of a previous decision denying an honour or award.

45. It should have been apparent however that those criteria, if they were ever valid, were patently inapplicable and non-sensical in the circumstances. Because Defence considered (albeit mistakenly) that Major Kemp's eligibility for an honour had never previously been considered it should have concluded that:

- There was no previous decision that could be reviewed;
- There was no previous process to assess for maladministration; and
- There was no evidence before a non-existent decision maker to compare with that presented to assess whether the latter was new or compelling.

46. In the result, therefore, Defence completely failed to consider the primary application made by Lieutenant Colonel Hulse. It simply did not consider whether Major Kemp's actions met the eligibility criteria for any honour or award. This was a complete failure of proper process which is in no way excused by the mistaken belief

that there had been no previous consideration of Major Kemp's eligibility for recognition.

47. **Maladministration and/or compelling new evidence.** The Tribunal notes the Defence preference for maintaining a barrier to any merits based review of applications concerning honours and awards. That barrier requires Defence adjudication as to whether maladministration in process is evident or whether new information has been brought to attention by the applicant. Through the hearing of this matter, it was apparent to the Tribunal that Defence may have taken a different position had a full merits based review of Lieutenant Colonel Hulse's application been conducted. It also appears to the Tribunal that the Defence view of maladministration is very narrow - one limited to detecting if any administrative process errors could be found in archived documentation pertaining to a previous award nomination. In this instance no such errors were found and a presumption was made that absence of evidence to the contrary confirmed a correct assessment process.

48. Major Kemp was nominated for a MID by Brigadier Hughes, the Commander of the 1st Australian Task Force, Vietnam. The Tribunal has considered Brigadier Hughes' nomination list and observes that Major Kemp's name appears third on a prioritised list of thirty four MID nominees. The Tribunal also observes that nominations for the Distinguished Service Order appear to be the preserve of Lieutenant Colonels and above. The MID may well have been regarded by Brigadier Hughes as the only option available to recognise Major Kemp's service.

46. The Tribunal also reflected on the names culled from Brigadier Hughes' nomination list by higher headquarters. While no evidence is available of the process that led to the final list, to a casual observer it appears to favour infantry officers over others.⁸ The Tribunal cannot accept the Defence proposition that the absence of evidence of (administrative) maladministration within the award nomination process can be interpreted as the process having been conducted correctly. This is a step too far, when the results of the process could be interpreted to have been biased against recognition for Major Kemp. However, the Tribunal's view of the administration of Major Kemp's MID nomination has no bearing on the issue to be decided.

49. The Tribunal accepted Defence concurrence that the level, breadth and complexity of Major Kemp's achievements compared favourably with the level of achievement expected in current nominations. The Tribunal noted that this comparison was drawn after the Defence representatives had heard the evidence presented to the Tribunal, including the citation in Brigadier Hughes' nomination of Major Kemp for the award of the MID. Unfortunately, the level, breadth and complexity of Major Kemp's achievements were not considered earlier by Defence as the conclusion reached regarding the absence of 'compelling new evidence' had precluded any further consideration of the matter on the merits.

⁸ The Tribunal has noted that during the period of Colonel Kemp's tour of duty in Vietnam, five out of five Lieutenant Colonels in loosely equivalent commands were awarded the DSO or OBE. MIDs were awarded to Majors commanding Cavalry, Armoured or Special Forces Squadrons.

50. The Tribunal noted that the Defence assessment methodology, outlined by Lieutenant General Burr in his decision to not support the award,⁹ precluded the conduct of merits based review despite being specifically requested to do so in the Tribunal's letter to the Secretary of 14 May 2020. Defence's failure to provide a merits based assessment of Major Kemp's command and leadership against the relevant criteria is a breach of its statutory obligations both as a model litigant under the *Legal Service Directions 2017* and under the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011*. Rule 14 requires the Defence Secretary to 'use his ... best endeavours to assist the Tribunal in relation to the review.' Rule 7 requires the report from the Secretary to include its 'findings on material questions of fact'.

51. **The Issue.** The issue for the Tribunal to consider is whether or not Colonel Kemp's service in Vietnam meets eligibility criteria for recognition.

52. **Distinguished service or gallantry.** The Tribunal noted that Lieutenant Colonel Hulse's original application requested '*decorations for nine Army personnel who, in my opinion, contributed service to the Army in a manner which was above and beyond that expected of soldiers at war*'. It was only at the insistence of Defence that he decided to nominate Colonel Kemp for the Distinguished Service Cross. Although not excluded from consideration, Colonel Kemp has not been nominated for his gallantry and little specific evidence was presented to support that outcome. For that reason, the Tribunal considered Colonel Kemp's service against the Distinguished Service Decorations Regulations.

Assessment of Distinguished Service

53. **Distinguished Service Decorations.** The Distinguished Service Cross, the Distinguished Service Medal and the Commendation for Distinguished Service were established by Letters Patent on 15 January 1991, in the Commonwealth of Australia Gazette S25, dated 4 February 1991 for the purpose of:

'... according recognition to members of the Defence Force and certain other persons for distinguished command and leadership in action or distinguished leadership in action or distinguished performance of their duties in warlike operations.'

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

Conditions for award of decorations

3. (1) *The Distinguished Service Cross shall be awarded only for distinguished command and leadership in action;*
- (2) *The Distinguished Service Medal shall be awarded only for distinguished leadership in action;*
- (3) *The Commendation for Distinguished Service may be awarded for distinguished performance of duties in warlike operations.*

Amendments to the eligibility criteria for the Distinguished Service Decorations were gazetted on 22 February 2012. The amendments omitted the term '*in action*' and inserted '*in warlike operations*'.

⁹ Letter, OCA/OUT/2019/BQ9653016, Lieutenant General Burr to Lieutenant Colonel Hulse dated 26 February 2020.

54. The Tribunal notes that the Distinguished Service Decorations regulations accord recognition in a hierarchy of command and leadership; leadership; and performance. Given that hierarchy, the Tribunal considered it appropriate that Colonel Kemp's service be considered against the eligibility criteria for the Distinguished Service Cross.

55. As there is no doubt that Colonel Kemp's command and leadership occurred '*in warlike operations*', the Tribunal considered whether Colonel Kemp's command and leadership was distinguished. In considering whether that service could be regarded as 'distinguished' the Tribunal had regard to both the nature of his command and leadership responsibilities and whether those responsibilities were additional or superior to those normally pertaining to his rank and appointment.

56. The Tribunal was satisfied that the size, breadth and complexity of Major Kemp's command exceeded that of other officers of his rank serving in Vietnam. The Tribunal also gave weight to Lieutenant Colonel Hulse's evidence that the breadth and complexity of the command exceeded that of some other Lieutenant Colonels serving in Vietnam, and that the record confirms the large size of his command.

57. The Tribunal also accepted that Major Kemp's command was not just distinguished by the size and complexity of the unit under his command but also by his achievements during his tenure. Achievements noted by the Tribunal included:

- developing and trialling new systems for clearing mine fields;
- personally retrieving the bodies of his soldiers from an active minefield;
- consistent demonstration of effective leadership of men employed across a diversity of tasks, through his personal example, contact and encouragement;
- effective perimeter defence while under significant enemy attack at FSB Coral;
- effective leadership and command of a much larger Field Squadron than would be deployed in the current context; and
- effective management of engineering tasks in a complex (multi-national) chain of command environment.

58. The Tribunal also gave weight to the 1968 description of Major Kemp's service as written by the Commander of the 1st Australian Task Force. Major Kemp's achievements are clearly laid out in Brigadier Hughes contemporaneous assessment that appears in his nomination of Major Kemp for a MID award¹⁰ as follows:

- From his arrival in Vietnam, Major Kemp and his unit participated in every major action fought by the 1st Australian Task Force.
- Major Kemp was responsible for the planning and direction of many hazardous engineering tasks.
- At all times Major Kemp displayed a high standard of engineering ability and considerable drive in his management.
- On many occasions Major Kemp exposed himself to personal danger during reconnaissance and supervision of tasks,

¹⁰ A copy of the MID nomination form is attached.

- Major Kemp's able leadership and outstanding example of devotion to duty instilled in his unit a high morale and a fine attitude of service, and
- Major Kemp's leadership, devotion to duty and professional ability reflected great credit on himself and the Australian Army.

59. It is clear from Brigadier Hughes' assessment, made very soon after the Battles of Coral and Balmoral, that Major Kemp demonstrated distinguished and superior command and leadership in warlike operations.

Conclusion

60. The Tribunal finds that Colonel Kemp's service in Vietnam meets the criteria for the award of the Distinguished Service Cross.

TRIBUNAL DECISION

61. Having reviewed the decision by the Chief of Army of 26 February 2020 to not support the award of the Distinguished Service Cross to Colonel John Kemp AM (Retd) for his service in Vietnam, the Tribunal decided to recommend to the Minister for Defence that the decision by the Chief of Army be set aside and that Colonel Kemp be awarded the Distinguished Service Cross for his command and leadership of 1st Field Squadron Group, Vietnam, between 1 November 1967 and 12 November 1968.

(Block Letters) KEMP		LG No	
Unit and Posting 1st Field Squadron Officer commanding		Recommended by (Col. R. H. H. H.) Brigadier Commander 1st Australian Task Force	Honour or Award MID
Date of Birth 29th May, 1937			
Date of Enlistment 11th December, 1957			
Next of Kin Mrs J. H. KEMP			
Relationship wife			
Home or Private Address 61 Saint John's Wood Road, S. ST JOHN'S WOOD, QUEENSLAND			

	Date Received	Date Forwarded
Brigade		
Division		
Corps		
Army		

To be left blank for approval

CITATION (to be completed by the initiating officer)

Place **BUI DAT, SOUTH VIETNAM**

Date **14th October, 1968**

Major John Howard Kemp graduated from the Royal Military College in December, 1957 and has served in regimental and engineering staff appointments in Australia. He arrived in South Vietnam in November, 1957 and was appointed to command 1st Field Squadron.

Since his arrival Major Kemp and his unit have participated in every major action fought by the 1st Australian Task Force. During these actions Major Kemp has been responsible for the planning and direction of many hazardous engineering tasks including the breaching of minefields and the destruction of enemy fortifications and tunnel systems. In addition Major Kemp has successfully planned and supervised extensive land clearing operations within the task force area of responsibility.

At all times Major Kemp has displayed a high standard of engineering ability and considerable drive in the management of the many tasks undertaken by his unit. He has on many occasions exposed himself to danger during reconnaissance and supervision of these engineer tasks.

By his able leadership and outstanding example of devotion to duty he has instilled into his unit a high morale and a fine attitude of service.

Major Kemp's leadership, devotion to duty and professional ability reflect great credit upon himself and the Australian Army.

Under enemy fire Second Lieutenant Molnar has continually shown his men the highest example of personal bravery and devotion to duty. His determination and aggressive spirit have been a splendid example to the officers and men in his company.