



Australian Government

Defence Honours and Awards Appeals Tribunal

Birchley and the Department of Defence [2022] DHAAT 8 (7 June 2022)

Re **Mr Andrew Birchley**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Stephen Skehill (Presiding Member)
Rear Admiral Allan du Toit AM, RAN (Retd)

Hearing Date 4 May 2022

Attendances Applicant – no attendance
Ms Jo Callaghan and Mr Wayne Parker
Directorate of Honours and Awards, Department of Defence
Mr Kevin Lawson, A/g Director, Nature of Service Directorate,
Department of Defence

DECISION

On 7 June 2022, the Tribunal decided:

1. pursuant to section 110VB(2)(a) of the *Defence Act 1903*, to affirm the decision that Mr Birchley is not eligible to receive the Australian Active Service Medal with Clasp ‘EAST TIMOR’; but
2. pursuant to section 110VB(3) of the Act, to recommend to the Minister that, to protect the integrity of the defence honours and awards system, the Department of Defence be directed to review the eligibility of any member of the ship’s company of HMAS *Manoora* who had been awarded the Australian Active Service Medal with Clasp ‘EAST TIMOR’ for service between 17 and 18 April 2000 and, if any such person was found not to be eligible to have received that award, to take all reasonable steps to withdraw that award and require return of the relevant medal and/or clasp.

CATCHWORDS

DEFENCE AWARD –Australian Active Service Medal with Clasp ‘EAST TIMOR’ – prescribed operation – Operation TANAGER – whether allotted for service

LEGISLATION

*Defence Act 1903 – Part VIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)
Defence Regulation 2016 Section 36*

Commonwealth of Australia Gazette S335 Australian Active Service Medal Regulations, Letters Patent, dated 2 November 1988

Commonwealth of Australia Gazette S110, Australian Active Service Medal Regulations, Ministerial Declaration and Determination, Clasp ‘EAST TIMOR’ dated 29 February 2000

Australian Active Service Medal Regulations, Ministerial Declaration and Determination, Clasp ‘EAST TIMOR’ dated 29 September 2001 (not gazetted)

Commonwealth of Australia Gazette S515, Australian Active Service Medal Regulations, Declaration and Determination, Clasp ‘EAST TIMOR’ dated 16 December 2004

Australian Active Service Medal Regulations, Instrument of Delegation dated 23 September 2018

Introduction

1. The Applicant, Mr Andrew Anthony Birchley, seeks review of a decision dated 24 March 2018 of Ms Allison Augustine, Assessments Manager in the Directorate of Honours and Awards of the Department of Defence (the Directorate), that he is not eligible for the Australian Active Service Medal (AASM) with Clasp 'EAST TIMOR' for his service in HMAS *Manoora* in April 2000.¹

Decision under review

2. On 6 October 2017, Mr Birchley submitted an online application to the Directorate for an assessment of his eligibility for the AASM with Clasp 'EAST TIMOR'. On 24 March 2018, in response to Mr Birchley's application, Ms Augustine wrote "*as a result of my assessment I regret I am unable to make a recommendation for the AASMET.*"²

3. On 8 July 2021, Mr Birchley made application to the Tribunal seeking a review of the above decision.³

Tribunal jurisdiction

4. Pursuant to s110VB(2) of the *Defence Act 1903* 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 a defence award in response to an application. Regulation 36 of the *Defence Regulation 2016* lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 is the AASM. Therefore, the Tribunal has jurisdiction to review decisions in relation to this award.

Mr Birchley's service

5. Mr Birchley enlisted in the Permanent Naval Force on 31 August 1992 and transferred to the Naval Standby Reserve on 23 February 2004 where he remained until discharge on 23 February 2009. Although not relevant to this case, Mr Birchley served in the Australian Army Reserve from 7 June 1982 to 25 August 1992.⁴

6. Relevant to this application, Mr Birchley was posted to the *Kanimbla* class amphibious warfare ship HMAS *Manoora* as a Leading Seaman Radio Operator from 23 September 1999 until 29 May 2001.⁵

¹ Letter to Mr Birchley from Ms Augustine dated 24 March 2018 in application.

² Ibid.

³ Application to Tribunal for review of decision, Mr Andrew Birchley, dated 8 July 2021.

⁴ Letter to Tribunal signed by Ms Petrina Cole, Director Honours and Awards, dated 26 August 2021.

⁵ ADO Record Birchley, Andrew Anthony 8094845.

8. Mr Birchley has been awarded the following for his combined service:

- Australian Active Service Medal with Clasp ‘IRAQ 2003’
- Iraq Medal
- Australian Service Medal with Clasp ‘SOLOMON IS’
- Defence Long Service Medal with First Clasp
- Australian Defence Medal
- Return from Active Service (RAS) Badge

9. Defence records confirm that on 17 April 2000 *Manoora* arrived in Dili, East Timor and departed the following day. *Manoora* is recorded as having ‘*offload(ed) civil aid material for East Timor and embark(ed) cargo for return to Australia*’.⁶ During this time, Dili was within the prescribed area of operations for Operation TANAGER, in support of the United Nations Transitional Administration in East Timor (UNTAET).

The Australian Active Service Medal with Clasp ‘EAST TIMOR’

10. The AASM was created by Letters Patent, signed by The Queen on 13 September 1988. As set out in the *Australian Active Service Medal Regulations 1988*, ‘*the Governor-General, on the recommendation of the Minister, may declare a warlike operation in which members of the Defence Force are, or have been on or after 14 February 1975, engaged, to be a prescribed operation for the purposes of these Regulations.*’⁷

11. On 1 March 2000, the Governor-General approved certain conditions for the creation of the AASM with Clasp ‘EAST TIMOR’.⁸ The Governor-General declared, relevantly:

(a) *declare under regulation 3, the following warlike operations in which members of the Australian Defence Force are engaged in the area comprising East Timor and the sea adjacent to East Timor out to a distance of 12 nautical miles from the low water mark to be a ‘prescribed operation’ for the purposes of the regulations:*

- (i) *Operation ‘Faber’ that commenced 16 September 1999;*
- (ii) *Operation ‘Warden’ that commenced 16 September 1999;*
- (iii) *Operation ‘Tanager’ that commenced 20 February 2000.*

12. On 16 December 2004, the above declaration and determination was revoked by *Commonwealth of Australia Gazette, S515, Australian Active Service Medal Regulations, Declaration and Determination.*⁹

[...]

(b) *declare under regulation 3, the following warlike operations in which members of the Australian Defence Force are engaged in the area comprising East Timor and the*

⁶ Ship’s Movements HMAS *Manoora* Feb 2000 to Jun 2002.

⁷ *Commonwealth of Australia Gazette, S335, Letters Patent, Australian Active Service Medal Regulations*, dated 2 November 1988.

⁸ *Commonwealth of Australia Gazette, S110, Australian Active Service Medal Regulations, Declaration and Determination*, dated 29 February 2000.

⁹ *Commonwealth of Australia Gazette, S515, Australian Active Service Medal Regulations, Declaration and Determination*, dated 16 December 2004.

sea adjacent to East Timor out to a distance of 12 nautical miles from the low water mark to be a 'prescribed operation' for the purposes of the regulations:

- (i) Operation 'Faber' that commenced 16 September 1999 and ended on 23 February 2000;*
- (ii) Operation 'Warden' that commenced 16 September 1999 and ended on 10 April 2000;*
- (iii) Operation 'Tanager' that commenced on 20 February 2000 and ended on 19 May 2002;*
- (iv) Operation 'Citadel' that commenced on 20 May 2002 and ended on 17 August 2003.*

(c) determine, under subregulation 4(2) of the Regulations, that the conditions for the award of the AASM with Clasp 'EAST TIMOR' ("the Medal") for that prescribed operation are:

- (i) The Medal may be awarded to a member of the Australian Defence Force who rendered allotted service as such a member while posted as a member of the Australian element for duty to the prescribed operation for a prescribed period;*

...

- (iv) For the period that commenced on 16 September 1999 and ended on 17 August 2003, the Medal may be awarded to a member of the Australian Defence Force who rendered service as such a member and who for a prescribed period, undertook official visits, inspections or other occurrences of a temporary nature in connection with the military contribution in the prescribed operation;*

...

- (vi) In this paragraph "prescribed period" means:*
 - (A) in relation to subparagraphs (c)(i), (c)(ii) and (c)(v), a period of not less than one day; and*
 - (B) in relation to subparagraph (c)(iv), a period of not less than an aggregate of 30 days;*

PROVIDED THAT the qualifying period of service as described in subparagraphs (c)(i), (c)(ii) or (c)(iii) may be deemed by the Chief of the Defence Force or delegate to have been established notwithstanding that the member has not met the qualifying periods described if service in relation to the prescribed operation was terminated owing to the death, evacuation due to illness or injury or other disability due to service; [...]

Mr Birchley's application to the Tribunal

13. In his application to the Tribunal, Mr Birchley stated:

“

1. *I was posted to HMAS Manoora during the trip to East Timor during the operation time-period in April 2000.*
2. *As well as PMkeys, the operation in East Timor is published in (the RAN website)¹⁰ HMAS Manoora (II) Royal Australian Navy Note 1.*
3. *HMAS Manoora was physically in East Timor (Dili) or within close vicinity of East Timor for more than 24 hours.*
4. *Some members of the HMAS Manoora crew have been awarded by Honours & Awards, whilst others have been rejected.*
5. *Honours & Awards have detailed records of those that have been awarded for Service in East Timor,*
6. *During the assessment of 2018 (attached) consideration was not given to the fact that other members' of the ships' company had been awarded by Honours& Awards.*
7. *At least one member who was awarded by Honours& Awards is/was a Navy Officer whilst applications from non-commissioned officers were rejected.*

Note 1 above—On 17 April 2000 she commenced her first operational task when she anchored in Dili Harbour (East Timor) to offload civil aid materials and two passenger vehicles. Manoora then embarked a large quantity of excess ammunition and general cargo via stern door marriage with the heavy loading craft HMAS Betano. The ammunition and stores had been dispatched to East Timor to support INTERFET in 1999 but had not been used. She sailed from Dili on the 18th and offloaded her cargo in Darwin on 20 April.”¹¹

Defence Report

14. The Defence Report states that following Mr Birchley's application to the Tribunal, Defence reviewed the original decision from 2018 and re-assessed Mr Birchley's eligibility for the AASM with Clasp 'EAST TIMOR' afresh. The re-assessment was endorsed by the Assistant Director, Veterans and Families, and supported the original decision to not recommend Mr Birchley for the AASM with Clasp 'EAST TIMOR'.¹²

15. Defence does not dispute that Mr Birchley was a member of the ship's company when HMAS *Manoora* was within the area of Operation TANAGER; however, it states that there is no evidence that either he, the ship's company, or in fact the ship herself was allotted for service to the operation.¹³

¹⁰ <https://www.navy.gov.au/hmas-manoora-ii>

¹¹ Application to Tribunal from Mr AA Birchley.

¹² Letter to Tribunal signed by Ms Petrina Cole dated 26 August 2021.

¹³ Ibid.

16. As detailed in *Manoora's* Report of Proceedings for April 2000, dated 7 May 2000 (attached to the Defence Report), while in Dili the ship offloaded a large quantity of civil aid material, including two passenger vehicles and embarked a quantity of ammunition and general cargo for return to Australia.¹⁴

17. Defence discusses the term “allotment” which it states is a technical term relating to a special administrative procedure designed to accurately identify persons or units whose duties are directly related to warlike activities within a defined operational area. Defence went on to state that Instruments of Allotment are required by legislation to determine eligibility for entitlements under both the *Veterans' Entitlements Act 1986* (the VEA) and the *Income Tax Assessment Act 1936* (the ITAA).¹⁵

18. Defence stated that Instruments issued for the purpose of the VEA require signature by the Vice Chief of the Defence Force (VCDF) in accordance with subsection 5B (2) of that Act, and in the case of the ITAA, the Chief of the Defence Force (CDF) delegates his or her responsibility to VCDF.

19. Defence further stated that: *‘in contemporary times, “Allotment” (although not specifically worded as such) is reflected in an individual’s service record within the Operational Service Log, showing the operation name and duration of service rendered on the operation. Neither her Service Record, nor ADO Service Record from (PMKeyS) contain entries of Mr Birchley rendering any operational service during his posting on the HMAS Manoora.’*¹⁶

20. Defence went on to state that: *‘Further, lists grouped by ship or land force element, such as a Battalion Group, showing individuals from the respective Service, who rendered qualifying service for the AASM East Timor are held by Defence. The lists were used as the basis for awarding the AASM ‘EAST TIMOR’. No such list exists for HMAS Manoora.’*¹⁷

21. Defence also stated that any crew member of the HMAS *Manoora* (including the Navy Officer referred to by Mr Birchley) whom has been awarded the AASM ‘EAST TIMOR’ for service solely rendered on 17 – 18 April 2000 while in the area of the prescribed operation, Operation TANAGER, has been awarded in error and has no entitlement to the award. Defence further stated that, without the provision of the crew members’ name/s, Defence cannot take action to correct the erroneous awarding of the medal/clasp.¹⁸

22. Defence then stated that the review confirmed that Mr Birchley’s service in HMAS *Manoora* on 17-18 April 2000 was not allotted service to a prescribed operation and did not meet the conditions of the award of the AASM ‘EAST TIMOR’.¹⁹

¹⁴ HMAS *Manoora*, Report of Proceedings.

¹⁵ HMAS *Manoora*, Report of Proceedings.

¹⁶ Letter to Tribunal signed by Ms Petrina Cole dated 26 August 2021.

¹⁷ Ibid Folio 15-16.

¹⁸ Ibid Folio 15.

¹⁹ Ibid Folio 15.

Mr Birchley's comments on the Defence report

23. On 31 August 2021, Mr Birchley was provided with a copy of the Defence Report and asked to provide his comments on that report within 20 working days of receiving it. Not having heard from him within that period, on 6 October 2021 Mr Birchley was contacted by the Secretariat to ascertain if he wished to make comment on the Defence Report. He advised that he wished to make no comment.²⁰

24. A subsequent submission from the Department of Defence, in which it responded to questions asked of it by the Tribunal in relation to the issue of allotment, was sent to Mr Birchley and he was invited to offer any comment he wished to make. No comment was received from him.

Conduct of the Review

25. On 22 April 2022, the Tribunal contacted Mr Birchley by telephone and advised that a hearing was intended for 4 May 2022. On 27 April 2022, the Tribunal provided, by email, written confirmation of the date and time of the hearing and the full package of Tribunal review documents. Mr Birchley was invited to provide details of his skype account and to test his skype connection prior to the hearing, however no response was received to this request.

26. The Tribunal then sought on a number of occasions to contact him to confirm his participation at the hearing, however it was not possible to reach him as there was no response to voicemails left on his telephone or to emails sent to him.

27. Given that he had access to all the material submitted by Defence and had offered no comment, the Tribunal decided to proceed with the hearing on the nominated date when contact was again sought, unsuccessfully, to be made with him. At this hearing Defence introduced no new material of which Mr Birchley should have been made aware.

28. Accordingly, the Tribunal further decided that, rather than postpone the resolution of this matter indefinitely the appropriate course was to prepare a draft decision based on all the material before it and to then send that draft to Mr Birchley advising that the Tribunal would make a decision in those terms unless he provided comment within a nominated reasonable period.

29. The Tribunal thus sent Mr Birchley a draft of this decision by email and invited his comment within 20 working days. No comment was received from Mr Birchley. The Tribunal then proceeded to finalise its decision, based on the draft provided to him.

Matters for the Tribunal

30. This review, and three other applications relating to *Manoora's* service in 2000, was brought about following an approach to the Tribunal by a former member of *Manoora's* ships' company who had been awarded the AASM with Clasp 'EAST TIMOR' for his service in April 2000. However, following an unsuccessful application to DVA for recognition of qualifying service, enquiries were made to Defence and the former member was given written advice by Defence that the issue of the above award was made in error, but Defence did not

²⁰ Emails to and from Mr Birchley and the Tribunal, 6 October 2021.

seek return of the above award, or advise that it would be cancelled. The former member later contacted former members of *Manoora*'s ships company via Facebook and invited anyone who had made application for the award and been refused to submit an application for review in the Tribunal, with *'the main claim of having the whole crew sorted out'*.

31. If Mr Birchley's application for review is to succeed, it can only be under clause (c)(i) of the *Commonwealth of Australia Gazette, S515, Australian Active Service Medal Regulations, Declaration and Determination*. Mr Birchley served in the *Manoora* in East Timor only on 17/18 April 2000. Service under clause (c)(i) qualifies for recognition if it is of at least one day's duration. Other clauses are either inapplicable in the present circumstances or service must be for 30 days. Under clause (c)(i), service must be "allotted".

32. While the Defence Report provided some explanation of the meaning of that term and contended that the eligibility criteria had not been met, the Tribunal sought a better understanding of related issues. Accordingly, the Tribunal requested that Defence provide a supplementary submission to address the following questions:

- Is there a statutory definition of the term "allotted service" or "allotment"?
- If not, is there an authoritative administrative definition?
- In either case, what are the criteria by which decisions are made to allot or not allot?
- Was there an express decision not to allot *Manoora* to Operation TANAGER or was it simply not allotted?
- What are the criteria by which decisions are made to retrospectively allot?

33. Defence provided that supplementary submission on 4 April 2022 and it was then forwarded to Mr Birchley for his consideration, but he offered no comment on it.

34. The term "allotted service" is not defined in the AASM Regulations or in other Defence legislation. However, section 5B of the VEA provides as follows:

(1) *In this Act, unless the contrary intention appears:*

***allotted for duty** in an operational area has the meaning given by subsection (2).*

...

Allotted for duty

(2) *A reference in this Act to a person, or a unit of the Defence Force, that was **allotted for duty** in an operational area is a reference:*

(a) in the case of duty that was carried out in an operational area described in item 1, 2, 3, 4, 5, 6, 7 or 8 of Schedule 2 (in column 1)—to a person, or unit of the Defence Force, that is allotted for duty in the area (whether retrospectively or otherwise) by written instrument issued by the Defence Force for use by the Commission in determining a person's eligibility for entitlements under this Act; or

(b) in the case of duty that was carried out in an operational area described in item 3A, 3B, 9, 10, 11, 12, 13, 14 or 15 of Schedule 2 (in column 1)—to a person, or unit of the Defence Force, that is allotted for duty in the area

- (whether retrospectively or otherwise) by written instrument signed by the Vice Chief of the Defence Force for use by the Commission in determining a person's eligibility for entitlements under this Act; or*
- (c) *to a person, or unit of the Defence Force, that is, by written instrument signed by the Defence Minister, taken to have been allotted for duty in an operational area described in item 4 or 8 in Schedule 2 (in column 1).*

35. East Timor during the relevant period in 2000 is not listed in any of the items in Schedule 2 referenced in this definition.

36. While Defence advised that it had found no express decision not to allot HMAS *Manoora* to Operation TANAGER, it drew the Tribunal's attention to a Minute dated 30 March 2001 from the then Head Strategic Command, Air Vice Marshal Angus Houston, which evidences that the possibility of retrospective force assignment (or allotment) of units to Operation TANAGER had been considered but that the Chief of the Defence Force had decided that "*units based in Australia employed on national tasking in limited support of Australian, and on occasions, other force elements are not an integral part of the [Peace Keeping Force], and that there is no intention to force assign such units or their sub-elements to Operation TANAGER.*"

37. The Tribunal does not have jurisdiction to review decisions to issue allotment instruments under section 5B of the VEA.

38. While it does have power under section 110VB(3) of the *Defence Act 1903* to make any recommendation to the Minister that it considers appropriate arising out of a review that is within its jurisdiction, the Tribunal is not satisfied that it should recommend any further consideration of retrospective allotment of *Manoora* by the CDF, as the evidence shows that this has previously been considered at the most senior levels of the ADF and there is nothing in the record of that consideration that suggests its conclusion was unwarranted.

39. Therefore, because HMAS *Manoora* and its ship's company were not allotted for service on Operation TANAGER, Mr Birchley is not eligible to receive the AASM with Clasp 'EAST TIMOR' and the decision under review must be affirmed by the Tribunal.

40. Nevertheless, the Tribunal should not let the issues raised by Mr Birchley (and other applicants seeking the same award) rest there.

41. He and others have asserted that several members of the crew who rendered the same service have been awarded the AASM with Clasp 'EAST TIMOR'. Names of at least some persons said to be in this category have been mentioned orally or in writing in the course of the Tribunal's review processes and, while it is inappropriate for them to be mentioned here, they are known to Defence.

42. Mr Birchley may be justifiably aggrieved by the injustice and inequity he perceives. He would not be alone in this, as is apparent from other applications for review currently before the Tribunal.

43. Defence has stated that any such awards to crew members with only the same service would have been made in error. At the same time Defence has not challenged the assertion that it advised one such recipient that he had been awarded in error but did not seek return of the award, or advise that it would be cancelled.

44. The Tribunal accepts that it is simply inevitable that, on occasions, an award may be made in error and, in the absence of evidence of wilful negligence or deliberate corruption or similar, it does not believe that those responsible for such errors should be castigated.

45. But it does consider that, to allow identified errors to stand without remediation or to fail to investigate reasonably alleged or suspected errors, calls into question the very integrity of the defence honours and awards system and of the Department's administration of it and that this would be a cause for criticism.

46. At a previous hearing of a related matter, Ms Callaghan advised that the Directorate has the capacity to identify any crew members of *Manoora* on 17 and 18 April 2000 who have been awarded the AASM with Clasp 'EAST TIMOR'. She noted that it is possible that any such persons might properly have been awarded the AASM if they met an alternative eligibility criterion during another period in East Timor. And she noted that Defence may not have current contact details for any such person if they had no ongoing relationship with Defence. Ms Callaghan confirmed this at the hearing of the present application on 4 May 2022.

47. In the Tribunal's view, there is sufficient doubt about past grants that Defence should investigate by identifying all members of the ship's company of *Manoora* who have been awarded the AASM with Clasp 'EAST TIMOR', by reviewing their eligibility for that award, and by deciding to cancel or withdraw any awards made in error and require their surrender unless the recipient can show cause why they were in fact entitled. While Defence may not have current contact details for such a person, that does not mean that those details cannot be obtained – for example, through electoral rolls. And, if other Government bodies cannot pass on to Defence contact details for individuals with whom they have a current relationship, they may be able to pass on to such individuals correspondence from Defence advising them of the proposed decision, the opportunity to show cause, and the request for surrender if eligibility is not confirmed.

Tribunal Decision

48. In light of the above analysis, the Tribunal has decided:

1. pursuant to section 110VB(2)(a) of the *Defence Act 1903*, to affirm the decision that Mr Birchley is not eligible to receive the Australian Active Service Medal with Clasp 'EAST TIMOR'; but
2. pursuant to section 110VB(3) of the Act, to recommend to the Minister that, to protect the integrity of the defence honours and awards system, the Department of Defence be directed to review the eligibility of any member of the ship's company of HMAS *Manoora* who had been awarded the Australian Active Service Medal with Clasp 'EAST TIMOR' for service between 17 and 18 April 2000 and, if any such person was found not to be eligible to have received that award, to take all reasonable steps to withdraw that award and require return of the relevant medal and/or clasp.