



Australian Government

Defence Honours and Awards Appeals Tribunal

Hulse and the Department of Defence re: Norden DHAAT 11 (20 July 2022)

File Number	2021/020
Re	Lieutenant Colonel George Hulse OAM (Retd) on behalf of Private Richard Norden DCM (dec.) Applicant
And	The Department of Defence Respondent
Tribunal	Mr Stephen Skehill (Presiding Member) Mr David Ashley AM Ms Karen Fryar AM Major General Mark Kelly AO, DSC (Retd)
Appearances	Lieutenant Colonel George Hulse OAM (Retd) – Applicant Brigadier Mark Bornholt AM (Retd), Army Historical Honours and Awards Reviewing Officer, Directorate of Honours and Awards, Department of Defence
Hearing Date	1 June 2022

DECISION

On 20 July 2022, the Tribunal decided to recommend to the Minister that:

- (a) the decision of the Chief of Army, Lieutenant General Rick Burr AO, DSC, MVO to refuse to recommend the late Private Richard Norden DCM for the Victoria Cross for Australia should be rejected; and
- (b) the Minister should instead recommend to the Governor-General that Private Richard Norden should be awarded the Victoria Cross for Australia.

Further, the Tribunal suggests that the draft citation set out at paragraph 151 of these reasons be considered as appropriate to accompany conferral of such an honour.

CATCHWORDS

DEFENCE HONOUR – Victoria Cross for Australia – Battles of Fire Support Bases Coral and Balmoral – gallantry in action – Imperial Distinguished Conduct Medal

LEGISLATION

Defence Act 1903 – Part VIIC – Sections 110T, 110V(1), 110VB(1), 110VB(6)

Defence Regulation 2016 Section 35

Victoria Cross for Australia

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

Introduction

1. The Applicant, Lieutenant Colonel George Hulse OAM (Retd) seeks review of a decision of the Chief of Army, Lieutenant General Rick Burr AO DSC MVO, that the late Private Richard Norden DCM should not be recognised with the Victoria Cross for Australia for service during the Battle of Fire Support Base Coral in Vietnam on 14 May 1968.¹

Decision under review

2. On 7 September 2020, Lieutenant Colonel Hulse wrote to Ms Petrina Cole, Director, Honours and Awards in the Department of Defence, seeking review of the award of the Distinguished Conduct Medal (DCM) that was conferred on Private Norden in 1968.² In his application, Lieutenant Colonel Hulse stated that, on 14 May 1968, Private Norden ‘performed acts that transcend the award of the DCM’ and were, in his opinion, more closely aligned to the Victoria Cross for Australia.³

3. On 24 November 2021, Lieutenant General Burr replied to Lieutenant Colonel Hulse refusing the application for the Victoria Cross for Australia, stating that in his view the award of the DCM was appropriate.⁴

4. On 7 December 2021, Lieutenant Colonel Hulse made application to the Tribunal seeking review of the Chief of Army’s decision, arguing that Private Norden’s actions met the criteria for the Victoria Cross and that, in his view, Lieutenant Colonel Bennett (Private Norden’s Commanding Officer at the time of the action on 14 May 1968) and the Chief of Army had not done justice to Private Norden. Lieutenant Colonel Hulse requested that the decision be reviewed by the Tribunal, ‘using a process that allows an opportunity for witnesses to describe Private Norden’s actions, and that the deliberations of the DHAAT on the adequacy of his decoration be addressed’.⁵

Tribunal jurisdiction

5. 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 Defence Force to refuse to recommend a person for a defence honour in response to an application. Regulation 35 of the *Defence Regulation 2016* lists the defence honours that may be the subject of a reviewable decision. Included in that list is the Victoria Cross for

¹ Application for review, 4 November 2021.

² The Defence report makes reference to a June 2018 submission by Lieutenant Colonel Hulse to the Chief of Army, however this was not submitted by the applicant to the Tribunal, nor could it be located by Defence (see research report submitted by Major JT Fardell).

³ Letter, Lieutenant Colonel George Hulse to Ms Petrina Cole, 7 September 2020.

⁴ Letter, Lieutenant General Burr to Lieutenant Colonel Hulse, OCA/OUT/2021/BN23813547, 24 November 2021.

⁵ Application for Tribunal review.

Australia. Therefore, the Tribunal has jurisdiction to review decisions in relation to this defence honour.

6. 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 under review, but may make any recommendations to the Minister that it considers appropriate.

7. As required by s110VB(6) of the Act, the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision.

Conduct of the review

8. In accordance with its Procedural Rules, on 13 December 2021 the Tribunal wrote to the Secretary of the Department of Defence informing him of Lieutenant Colonel Hulse's application for review.⁶ The Tribunal requested a merits-based assessment of Private Norden's actions against the eligibility criteria for the Victoria 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.

9. On 15 March 2022, the Director of Honours and Awards in the Department of Defence provided a submission on behalf of Defence.⁷ The Defence submission consisted of a report written by the Army Historical Honours and Awards Reviewing Officer, Brigadier Mark Bornholt AM (Retd), covering a further research report written by Major JT Fardell. In conclusion, Brigadier Bornholt's report stated that he did not consider that Private Norden's actions on 14 May 1968 met the eligibility criteria for the Victoria Cross, and that his review of the matter has confirmed that the DCM awarded was appropriate recognition for Private Norden's actions.⁸

10. The Defence submission was forwarded to Lieutenant Colonel Hulse for comment on 16 March 2022. Lieutenant Colonel Hulse responded on 30 March 2022 setting out his disagreement with a number of points in the Defence submission, and seeking continuation of the Tribunal's review.⁹

11. At the Tribunal hearing, the Chair drew attention to the fact that Brigadier Bornholt, who appeared for Defence, had previously been a member of the Tribunal. He noted that the period of Brigadier Bornholt's tenure pre-dated that of three members of the panel assigned to this matter, but did overlap with the tenure of the fourth member. He advised the parties that he had concluded that this fact was not sufficient to give rise to a reasonable

⁶ Letter, Tribunal to Secretary, DHAAT/OUT/2021/545, dated 13 December 2021.

⁷ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2022/0012 dated 15 March 2022.

⁸ Defence Submission – Actions of Private Richard Norden DCM.

⁹ Letter, Lieutenant Colonel Hulse to the Tribunal, dated 30 March 2022.

claim for that fourth member to stand aside as, to his observation, that member was fiercely independent in his analysis and decision-making and would give to Brigadier Bornholt's submissions no greater weight than they warranted on their merits. Neither party demurred.

12. At the hearing, both Lieutenant Colonel Hulse and Brigadier Bornholt made detailed submissions. Additionally, Lieutenant Colonel Hulse led evidence from three witnesses:

- a) then Second Lieutenant Chris Forde, the Platoon Commander at the time of the events in question;
- b) then Private Rodney Forster, who saw much of those events; and
- c) then Private Stan Barrett, who also saw all of the events.

13. These witnesses provided a deal of detail about those events which was additional to that otherwise documented in the material available to Defence prior to the hearing. The Tribunal takes this opportunity to express its gratitude to each of them for the assistance that their evidence provided, and for doing so when recounting and being questioned would have undoubtedly evoked deeply emotional memories for them.

Private Norden's service

14. Private Norden enlisted in the Australian Army on 27 April 1966 and discharged three years later, having completed his three-year period of service.¹⁰ Relevant to this application, he arrived in Vietnam on 5 December 1967, on posting to 1 Australian Reinforcement Unit. On 31 January 1968, he was posted to the 7th Battalion, the Royal Australian Regiment, and on 10 April 1968 was posted to the 1st Battalion, the Royal Australian Regiment (1 RAR). He left Vietnam on 13 August 1968 after being wounded in action on 5 August 1968. For his service, Private Norden would be eligible for the following:

- a) Distinguished Conduct Medal;
- b) Unit Citation for Gallantry;
- c) Australian Active Service Medal 1945-75 with Clasp 'VIETNAM';
- d) Vietnam Medal;
- e) Australian Defence Medal; and
- f) Republic of Vietnam Campaign Medal.

15. Upon discharge, Private Norden served with the Australian Capital Territory Police when, on 26 October 1972, he was involved in a traffic collision while on duty. Whilst there are conflicting dates (30 and 31 October 1972), Private Norden succumbed to his injuries. The Richard Norden DCM Club within the Duntroon Garrison is named in his honour.¹¹

¹⁰ Report, Review of the Distinguished Conduct Medal awarded to Private Richard Norden – upgrade to the Victoria Cross for Australia, Major JT Fardell.

¹¹ Report, Review of the Distinguished Conduct Medal awarded to Private Richard Norden – upgrade to the Victoria Cross for Australia, Major JT Fardell.

The Battles of Fire Support Bases Coral and Balmoral

16. These battles occurred to the north-east of Saigon in an area important to the North Vietnamese Army offensive operations being conducted and planned against Saigon in 1968. As part of a larger allied operation *Toan Thang* (complete victory), elements of the 1st Australian Task Force (1 ATF) were deployed to an Area of Operations (AO) in the Bien Hoa province defined as 'AO Surfers'. This deployment was an 'all consuming' operation for 1 ATF conducted some 120 kilometres from their base in Nui Dat and outside of their normal operating area in Phuoc Tuy province.

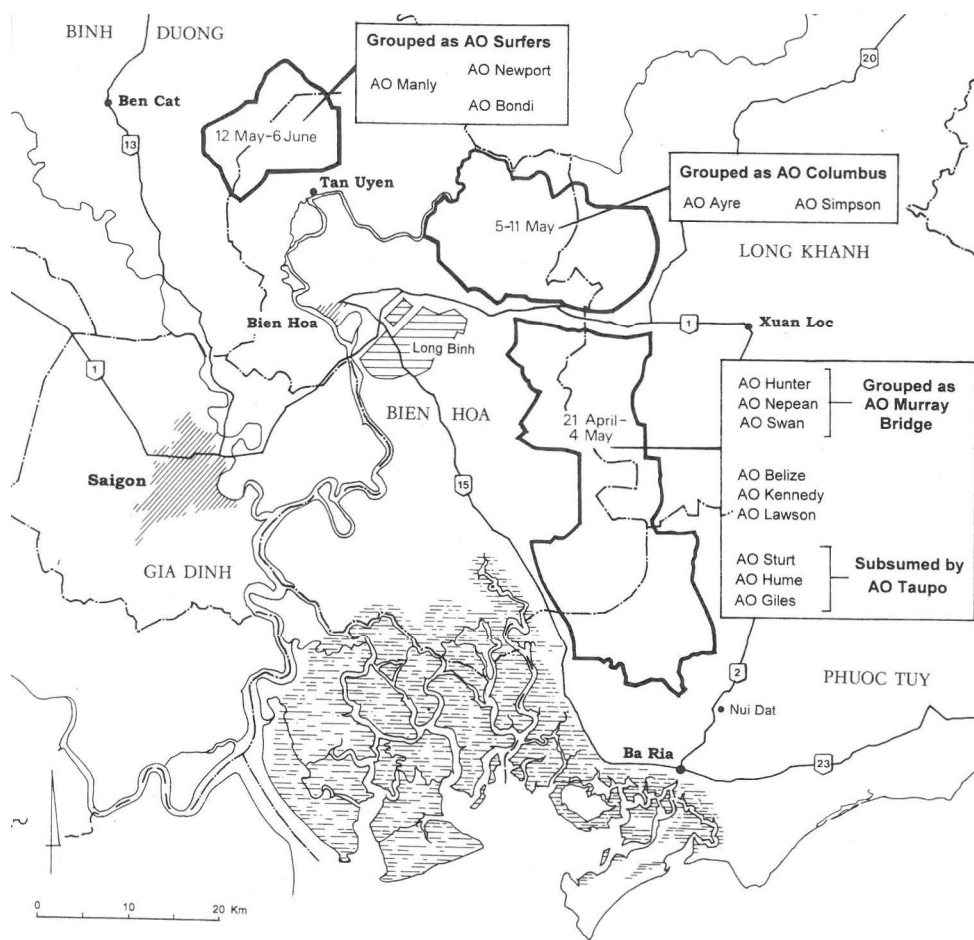


Figure 1. Extract from *On the Offensive* detailing the Areas of operation in Bien Hoa province – note Phuoc Tuy province to the southeast.¹²

17. Planning for Operation *Toan Thang* included the establishment of battalion patrol bases 'Coral, Coogee and Balmoral'. Deployment to AO Surfers commenced on 12 May 1968. Early in the morning of 13 May 1968, Fire Support Base Coral came under heavy and accurate mortar, rocket-propelled grenade and recoilless-rifle fire, followed by a determined infantry attack in estimated battalion strength. This attack was followed by a regimental strength attack on the night of 15/16 May. In the next phase of the battle, the

¹² McNeill & Ekins, *On the Offensive – the Australian Army in the Vietnam War 1967-1968*, Allen & Unwin, Crows Nest, 2000, p351

task force deployed tanks in close support of infantry to conduct company-sized reconnaissance-in-force operations, locating and destroying enemy installations. Fire Support Base Balmoral was attacked with coordinated mortar and ground attacks on the nights of 25/26 May and 27/28 May 1968. A total of 26 Australian soldiers died during the battles and over 100 were wounded.¹³

18. On 14 May, task force patrols had nine contacts with the enemy, the highest for the Australians for any day of patrolling during the operation. Most patrols were platoon strength, defensive in nature and generally not more than three to four kilometres from Fire Support Bases Coral and Coogee. During these contacts, the enemy lost 12 killed and two wounded with another two possibly wounded. The Australians suffered three killed and five wounded with a further two wounded when a rocket-propelled grenade was fired into FSB Coral.¹⁴

Private Norden's actions

19. The action that is the subject of this application is discussed in the official history in the following terms:

One of these patrols was remarkable for the extreme courage and devotion to duty displayed by one of its members. At 5.30pm on 14 May 5 Platoon B Company 1 RAR, was operating about one thousand metres from FSB Coral when it was ambushed by an enemy squad of six men. The forward scout and the section commander of the leading section were hit, twenty metres in front of the remainder of the section. Heavy enemy fire isolated the two wounded men.

Private Richard Norden of the leading section asked for covering fire and dashed forward under heavy enemy fire to the section commander, killing one enemy on the way. Having expended his own ammunition, he grabbed the automatic weapon of the dead Viet Cong soldier and fought off other enemy as he assisted the section commander back to the section. Although wounded, Norden again went forward under enemy fire and reached the forward scout, killing the Viet Cong who had been using the scout as a shield. Seeing that the scout was dead, Norden returned to the section, collected grenades, and cleared the area, enabling the scout's body to be recovered. His three attacks into the enemy position resulted in the position being secured. Norden was personally responsible for killing three of the enemy. For his outstanding example in saving the life of his section commander, recovering the body of the scout, and at the same time reversing the enemy's advantage, Private Norden was awarded the Distinguished Conduct Medal.¹⁵

¹⁴ Ibid, p374.

¹⁵ Ibid.

20. The action is briefly mentioned in the 1 RAR Commander's Diary Narrative. The diary records:

1730 5 PL B Coy were ambushed by 4-6 VC when in open ground. Sect APCs sent to reinforce 5 Pl which was split into two groups.

1800 5 Pl contact was broken with the results: KIA:-1201338 Pte C.R. Nisbet and WIA:-2412437 Pte R.L. Norden frag wound to buttocks. VC cas were 4 KIA(BC).¹⁶

21. The action is also set out in the citation supporting the award of the DCM to Private Norden, which was signed by the Commanding Officer of 1 RAR, Lieutenant Colonel P. H. Bennett, on 25 May 1968. It states:

... On 14 May 1968 during Operation Toan Thang, 5th Platoon, B Company came under heavy fire from an estimated squad of Viet Cong. In the initial contact both the forward scout and the section commander were wounded some twenty to thirty metres in front of the remainder of the leading section, which was isolated from the remainder of the platoon due to heavy and accurate enemy fire.

Private Norden, a member of the leading section, asked for covering fire and ran forward under heavy enemy fire to the wounded section commander. He killed one Viet Cong whilst moving forward, and having expended his ammunition recovered the enemy's automatic weapon which he used against further Viet Cong while assisting the wounded section commander back to the section. Due to this initial action the life of the section commander was saved under intense enemy fire.

Although wounded in his initial move forward Private Norden again advanced to the forward scout. He was fired on by an enemy soldier, but pressed forward and reached the scout killing the Viet Cong who had been using the scout as a shield. Private Norden having determined that the scout was dead, returned to the section, collected grenades and cleared the area so that the body of the scout could be recovered. His three attacks into the enemy position on his own resulted in the enemy position being secured.

Private Norden showed a complete disregard for his own personal safety, and by his courage and devotion to duty ensured the evacuation of a wounded man and the recovery of the body of the forward scout. Private Norden personally killed at least three Viet Cong in this action.¹⁷

22. Private Norden was recommended for the DCM by Lieutenant Colonel Bennett. This recommendation was endorsed by the Commander of the 1st Australian Task Force, Brigadier R.L. Hughes, and the Commander of Australian Forces in Vietnam, Major General A.L. MacDonald.¹⁸ Along with a number of other gallantry awards for service at

¹⁶ AWM95: 7/1/78 Part 1, 1 RAR Commander's diary, 14 May 1968.

¹⁷ AF-W3121 – Recommendation for Honours or Awards – Private Richard Norden.

¹⁸ Ibid.

Coral/Balmoral, Private Norden's DCM was gazetted in the 1968 mid-year list,¹⁹ with a number of others being picked up in the 1969 New Year's list.

Lieutenant Colonel Hulse's submissions

23. In his submission of 7 September 2020, Lieutenant Colonel Hulse provided his own description of the action of 14 May 1968:

On 14 May 1968, Private Richard Norden was a rifleman in 5 Platoon, B Company 1RAR as it patrolled an area near FSPB 'Coral'. The forward section of the platoon entered an enemy position with the result that the forward scout and the section commander behind him were shot and fell to the ground. The Australian platoon reacted quickly with the forward section extricating itself from the battle-space. This left the two leading Australian felled diggers isolated in the enemy position.

Private Norden realising that speed of retaliation was essential to the extraction of his wounded mates, rushed forward, singlehandedly, and killed one of the enemy soldiers. He was wounded doing this. He ran out of ammunition, but taking up the dead enemy soldier's weapon, he continued to fight the remainder of the enemy in the ambush. He rescued the section commander and brought him back alive to the patrol. Private Norden thought that his mate in the lead of the section might still be alive and surged forward again. He ignored any medical treatment for his own wound and with no regard to his own safety or his life, continued to attack the enemy position. He killed a second enemy soldier and was able to see at close quarter that the forward scout was dead. He went back to the section and taking as many grenades and as much ammunition as he could carry, charged the enemy position for the third time. So intensive was Private Norden's attack that the remaining enemy abandoned their position and quickly withdrew. Private Norden then brought back his dead mate to the platoon and had his own wound treated.²⁰

24. Lieutenant Colonel Hulse also provided a revised draft citation which states:

"In the afternoon of 14 May 1968, an Australian infantry platoon from B Company 1st Battalion of The Royal Australian Regiment was attacked by a group of enemy soldiers. The two leading Australian diggers were shot and fell to the ground. The Australian platoon extricated from the danger area and regrouped. Private Richard Norden, as a rifleman in the forward section, realised that if his felled mates were to be saved, speed and initiative were required. He attacked the enemy position on his own and after being shot and wounded himself, killed an enemy soldier. Running out of ammunition, he took up the dead enemy soldier's weapon and continued to fight the enemy in their position. He rescued the section commander and brought him back to the platoon thereby saving his life. He attacked forward for a second time in the hope of rescuing the leading scout. He did this with an untreated wounded but ignoring his own condition and with no regard for his own life, attacked the ambush

¹⁹ NAA: A2880, 5/5/50, Letter, the Hon. J.G. Gorton to the Governor-General, 5 August 1968.

²⁰ Application to Defence – 7 September 2020.

*killing a second enemy soldier. At this point, Private Norden could see that the forward scout was dead. He returned to his section and arming himself with grenades and more ammunition, singlehandedly attacked the enemy ambush for the third time. In a combination of grenade and rifle fire he forced the enemy to abandon their position and withdraw. He brought his dead mate back to the platoon. He then accepted medical aid for his own wound”.*²¹

25. Lieutenant Colonel Hulse submitted that the award of the DCM was not appropriate, arguing that Private Norden’s actions met what he believed were the criteria for the Imperial Victoria Cross.²² However, his submission actually referenced criteria close to the Victoria Cross for Australia (listed later in these reasons). Lieutenant Colonel Hulse then argued that Private Norden’s actions met the criteria for this award in that, in Lieutenant Colonel Hulse’s view, Private Norden:

- a) was in the presence of the enemy;
- b) performed acts of the most conspicuous gallantry;
- c) was daring;
- d) performed pre-eminent acts of valour;
- e) performed acts of self-sacrifice; and
- f) displayed extreme devotion to duty.

Defence’s position

26. Lieutenant General Burr’s refusal of Lieutenant Colonel Hulse’s application in respect of Private Norden appears to have been made following consideration of the report written by Major Fardell, and a decision brief also written by Major Fardell. In his report, Major Fardell stated that he reviewed the circumstances surrounding the award of the DCM to Private Norden to ascertain if there was any new evidence provided by Lieutenant Colonel Hulse, or if there was any evidence of maladministration that would warrant consideration of awarding a Victoria Cross to Private Norden.

27. Major Fardell concluded that Private Norden was ‘subject to due process’ with ‘the chain of command having access to all of the required information regarding the awarding of the DCM, or if it was assessed as appropriate or warranted, the VC.’ Major Fardell also concluded that Lieutenant Colonel Hulse had not presented any new evidence that was not available to the chain of command at the time of the action that would support the retrospective award of the Victoria Cross, and that Lieutenant Colonel Hulse had not identified any evidence of maladministration.²³

28. The decision brief was not provided to the Tribunal with the Defence Report, but was sourced by the Tribunal Secretariat in its own research phase.

²¹ Ibid.

²² Application to Defence – 7 September 2020.

²³ Report, Review of the Distinguished Conduct Medal awarded to Private Richard Norden – upgrade to the Victoria Cross for Australia, Major JT Fardell.

29. In his response to Lieutenant Colonel Hulse's application however, Lieutenant General Burr referred to the eligibility criteria for the Victoria Cross, noting that the Victoria Cross shall only be awarded 'for the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy'. Lieutenant General Burr stated that he was not satisfied that Private Norden performed acts of conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty.

30. Lieutenant General Burr went on to state that Private Norden was doing what was expected of him as a rifleman, albeit in hazardous conditions, that his actions were undeniably gallant and that he responded bravely and decisively in a perilous combat situation.

31. Lieutenant General Burr also noted that Private Norden was nominated for recognition by his Commanding Officer for 'courage and devotion to duty' and offered the opinion that, had his commanding officer sought a Victoria Cross, he would have written the nomination to reflect that. Lieutenant General Burr concluded that Private Norden had been appropriately recognised by the award of the DCM.²⁴

32. In its report, Defence drew the Tribunal's attention to a number of 'anomalies and assumptions' in Lieutenant Colonel Hulse's submissions, contending that Private Norden was not shot, as submitted by Lieutenant Colonel Hulse, and that some of the reasons he attributed for Private Norden's actions were speculative. Defence also introduced some doubt as to whether Private Norden 'saved the life of his wounded section commander' as submitted by Lieutenant Colonel Hulse.

33. Defence submitted that the citation for the DCM, written by the Commanding Officer and endorsed by the chain of command, was preferable to that submitted by Lieutenant Colonel Hulse. Defence also submitted that the official history and the commander's diary were reliable sources of evidence.

34. The Defence report includes an assessment of Private Norden's actions, based on the eligibility criteria and the above evidence. In making its assessment, Defence relied heavily on the assessment of the professional head of the Australian Army, Lieutenant General Burr, and the decisions taken by the chain of command in 1968 to recommend Private Norden for the DCM, and not the Victoria Cross, including through the wording of the citation that supported the recommendation.

35. The Defence report concluded that Private Norden's actions did not meet the eligibility criteria for the Victoria Cross, and that the DCM was appropriate recognition for those actions. In arriving at this latter point, Brigadier Bornholt offered the opinion that if

²⁴ Letter, Lieutenant General Burr to Lieutenant Colonel Hulse, dated 24 November 2021.

Private Norden was being considered for a contemporary decoration, he would meet the criteria for the Star of Gallantry ‘which is considered the equivalent of the DCM’.²⁵ In this assessment, and somewhat contrary to Lieutenant General Burr’s opinion, Brigadier Bornholt stated that in his view, it could be seen that Private Norden’s actions were conspicuous.

36. In its submission, Defence also cautioned against any progression of the matter without family consent. [In this respect, Lieutenant Colonel Hulse advised at the hearing that he had spoken to Private Norden’s brother who was keen to see a resolution of the present application, but that he had been unable to locate Private Norden’s widow who had remarried and whose current name and whereabouts were unknown to him.]

Imperial and Australian honours

37. Until February 1975, when the Government introduced the Australian honours and awards system, Australian service personnel received honours and awards under the Imperial system.

38. The two systems – the Imperial and the Australian - operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards.²⁶ This means that only contemporary decorations may now be recommended by the Tribunal.

The Distinguished Conduct Medal and the Victoria Cross

39. Private Norden was awarded the DCM in 1968, before the creation of the Australian suite of defence honours. Under the Imperial military honours system for which Australian military were then recommended, the DCM ranked immediately below the Victoria Cross as the second highest gallantry honour that could be awarded to an enlisted soldier for gallantry in the presence of the enemy. It was thus an honour of major significance, and remains so today.

40. The eligibility criteria for award of the Imperial Victoria Cross were as follows:

It is ordained that the Cross shall only be awarded for most conspicuous bravery, or some daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.

41. The eligibility criteria for the DCM were set out in a Royal Warrant of 1931 as follows:

It is ordained that The Distinguished Conduct Medal may be awarded on the recommendation of a Commander-in-Chief in the Field to Warrant Officers, Classes

²⁵ Defence Submission – Actions of Private Richard Norden DCM.

²⁶ Prime Minister of Australia Media Release 111/92 dated 5 October 1992.

I and II, non-commissioned officers and men serving in any of Our Military Forces for distinguished conduct in action in the Field.

42. By comparison, these DCM eligibility criteria are remarkably sparse – they offer no definition of “distinguished conduct” and it is not clear whether a high or a low bar is set or how it relates to the bar that had to be met for the Imperial Victoria Cross.

43. Accordingly, understanding the nature of the difference between conduct warranting an Imperial Victoria Cross and a DCM is impossible to discern from the Warrants themselves.

44. This situation may be contrasted with the equivalent awards under the Australian defence honours system.

45. The Victoria Cross for Australia may be awarded:

... for the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.

46. The defence honour immediately below the Victoria Cross for Australia is the Star of Gallantry which may be awarded for:

acts of great heroism or conspicuous gallantry in action in circumstances of great peril.

47. It is thus far less difficult to discern a degree of difference between circumstances that warrant award of the Victoria Cross for Australia and those that merit the Star of Gallantry. To qualify for the Victoria Cross for Australia, an ADF member must perform something in excess of an act of great heroism or conspicuous gallantry in action in circumstances of great peril.

48. Nevertheless, it is evident that assessing that difference in any particular case requires a considerable degree of subjective judgement.

49. The decision to award gallantry decorations lies with the Governor-General on the recommendation of the Minister. However, in relation to the Victoria Cross for Australia, the award can only be made by the Governor-General with the approval of Her Majesty Queen Elizabeth, Queen of Australia.²⁷

²⁷ Commonwealth of Australia Gazette No. S25 dated 4 February 1991, *Victoria Cross Regulations*.

Judgement of prior decision-makers

50. In this regard, Brigadier Bornholt urged that the Tribunal should find persuasive the judgements of:

- a) Lieutenant Colonel P H Bennett, Commanding Officer, 1 RAR;
- b) Brigadier R L Hughes, Commander, 1st Australian Task Force;
- c) Major General A L MacDonald, Commander, Australian Force Vietnam; and
- d) Lieutenant General R M Burr, Chief of Army.

51. Messrs Bennett, Hughes and MacDonald each recommended the award of the DCM to Private Norden in 1968. Lieutenant General Burr of course took the decision now under review in 2021, confirming that the DCM was in his view the appropriate honour.

52. We acknowledge that these are each senior military officers of great experience. Their judgement should not, and will not, be lightly dismissed by the Tribunal. But no one in their position is infallible and it is our statutory duty to exercise our own judgement in forming a view of what is the correct or preferable decision that should now be made. In doing so, however, we must clearly take their judgement into account and afford to it the full weight that we believe is warranted.

53. In assessing that weight, it is relevant to consider what information and evidence each had available to them in forming their judgement in relation to the level of the honour that should be conferred on Private Norden. Their capacity to form a sound judgement on that matter is intrinsically related to the quality and comprehensiveness of the relevant information placed before them.

54. In the case of Messrs Bennett, Hughes and MacDonald the evidence before us suggests that they formed their view that the DCM was warranted solely on the basis of the AF-W3121 Recommendation Form (the recommendation form) that was placed before them. It is important to emphasise that none was an eye-witness to the actions of Private Norden and there is no evidence that any of them made any enquiry of any eye-witness or anyone else who had a more detailed knowledge of what transpired on 14 May 1968. The accuracy and adequacy of the Citation set out in that form are thus key to ascertaining the weight that should be afforded to the judgement of each of them.

55. In the case of Lieutenant General Burr, it seems that he had before him:

- a) a Decision Brief which had been drafted by Major Fardell and cleared by Colonel C Kitchin after consultation with Brigadier Bornholt;
- b) a Research Report prepared by Major Fardell; and
- c) a draft letter, which he signed and which evidences the decision under review.

56. To assess the weight to be afforded to Lieutenant General Burr's judgement, it is thus necessary to consider the accuracy and adequacy of the Decision Brief, Research Report and draft letter.

57. So far as the citation is concerned, Mr Forde gave evidence at the hearing that the essence of the wording describing the action of 14 May 1968 which appeared on the recommendation form was prepared by himself when ordered by a more senior officer to "write someone up for a decoration". He said that he scribbled some notes to describe the actions of Private Norden on pages of his field message note book in the bottom of his weapon pit under his "hootchie" in a physically and mentally exhausted state. He said that, of all his soldiers, the actions of Private Norden stood out for him. However, as he had not personally seen all that Private Norden did, he sought clarification from those of his soldiers who had been eye-witnesses. He said that he had no knowledge of what honours or awards might relevantly be considered, or what their eligibility criteria might have been. He said that he had no prior experience or training in preparing such a document, or any knowledge of quite how what he wrote would be used or processed. While he remained of the view that what he wrote was factually accurate, he did not know whether it adequately captured all relevant facts or was expressed in the most appropriate language. He said that, after submitting his document, he heard nothing more about it and was not given any opportunity to provide a fuller report or to justify what he had written.

58. Importantly, Mr Forde had never seen the completed recommendation form until the present proceedings and it was not he who had inserted the DCM recommendation that was, after the form was prepared, made by Lieutenant Colonel Bennett and subsequently endorsed by Messrs Hughes and MacDonald.

59. And significantly, in preparing the citation, Mr Forde did not have access to the Pamphlet on Military Honours and Awards 1960²⁸ which was the guidance in place for the Vietnam War. Guidance for the award of the Victoria Cross in that pamphlet stated that it could be awarded "For most conspicuous gallantry of the highest order in the presence of the enemy. (A guide as to the standard required may be taken as a 90% possibility of being killed in performing the deed)."²⁹

60. Accordingly, both the accuracy and the adequacy of the citation text were matters that the Tribunal sought to test with witnesses at the hearing, as discussed below.

61. The Decision Brief and the Research Report are each extremely limited in their scope. They address only the questions of whether or not Lieutenant Colonel Hulse had adduced any compelling new evidence that was not available to prior decision makers, or whether any previous decision had been tainted by maladministration. In so doing, they

²⁸ *Pamphlet on Military Honours and Awards 1960*, War Office (MS3), July 1960.

²⁹ *Ibid*, Section F.

each failed to address the merits of previous decision-making and recommended that the previous decision be affirmed without regard to a re-consideration of its merits.

62. The fact that no new evidence is presented does not mean that a prior decision should be assumed to have been the correct or preferable decision. And the occurrence of maladministration does not necessarily mean that a prior decision so made will be incorrect or not preferable. “Compelling new evidence” and “maladministration” may be thresholds that Defence might, if it so wishes, choose to adopt in deciding whether or not to vary a prior decision in an administrative process of internal review. But they are concepts that are inconsistent with the statutory task of review with which the Tribunal is charged. Ascertaining what decision should be made on the merits is of course the task now before the Tribunal, and those documents do not advance us in that task in any way. The Tribunal must have regard to all relevant considerations and no irrelevant considerations, and must consider all evidence, whether or not it was previously available.

63. The letter signed by Lieutenant General Burr does address (albeit briefly) the eligibility criteria and relevant facts. However, and very significantly, it suggests that the author did not fully (or perhaps at all) consider the merits of the matter because it states that:

Your application contains no new evidence that would cause me to review Private Norden’s action ...

64. More fundamentally, it asserts that:

Private Norden was doing what was expected of him as a rifleman, albeit in hazardous circumstances

while at the same time, and it seems to us inconsistently, stating that:

His actions were undeniably gallant and he responded bravely and decisively in a perilous combat situation.

65. In our view, these statements made in the context of an application for a defence honour exhibit a confusion between the expectations of a rifleman and gallant performance (which we believe clearly exceeds expectations) and between perilous and hazardous circumstances (which the Gallantry Regulations distinguish from each other).

66. Accordingly, and notwithstanding the significant respect warranted by the office of Chief of Army as the professional head of the Army, we cannot give any compelling weight to the reasons provided in the letter setting out the decision under review. The Tribunal must assess all available evidence and reach our own view of whether or not Private Norden’s actions meet the eligibility criteria for the Victoria Cross for Australia.

Eligibility criteria for the Victoria Cross for Australia

67. Before turning to the evidence before us, however, it is necessary to record our view on the meaning to be afforded to those eligibility criteria.

68. As noted above, the eligibility criteria set out in the Victoria Cross Regulations are as follows:

... for the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.

69. Looking only at these words, it is not immediately clear whether it is only devotion to duty that needs to be in the presence of the enemy or whether the same requirement relates to gallantry, valour and self-sacrifice. Similarly, it is not immediately clear whether it is only an act of valour that needs to be daring or pre-eminent or whether that is also required of an act of self-sacrifice.

70. That potential confusion seems to be largely resolved, however, by the Letters Patent under which the Regulations were made, which explain that the Victoria Cross for Australia is to be:

The highest decoration for according recognition to persons who, in the presence of the enemy, perform acts of the most conspicuous gallantry, or daring or pre-eminent acts of valour or self-sacrifice or display extreme devotion to duty.

71. Read in the context of the Letters Patent, we consider that the eligibility criteria set out in the Regulations therefore require at least one of the following:

- a) an act of the most conspicuous gallantry in the presence of the enemy; or
- b) a daring act of valour in the presence of the enemy; or
- c) a pre-eminent act of valour in the presence of the enemy; or
- d) a daring act of self-sacrifice in the presence of the enemy; or
- e) a pre-eminent act of self-sacrifice in the presence of the enemy; or
- f) extreme devotion to duty in the presence of the enemy.

72. This then requires considerations of what these words and phrases actually mean. They appear to have no technical or “trade” meaning and thus should be afforded their ordinary meaning in English usage. But they also need to be read and interpreted in the context in which they appear, and as they interact and correlate with one another.

73. Dictionary definitions of “gallantry” include “courageous behaviour, especially in battle” (Concise Oxford Dictionary), “the quality of being brave when something is difficult or dangerous” (Cambridge Dictionary), “bravery shown by someone who is in danger, for

example when they are fighting in a war” (Collins Dictionary) and “spirited and conspicuous bravery” (Merriam Webster).

74. In *Hanuszewicz and the Department of Defence re: Cameron [2019] DHAAT 08* (confirmed and adopted in *Barnett and the Department of Defence re: Sheean [2019] DHAAT 09* and *Hulse and the Department of Defence re: Jensen [2020] DHAAT 15*) the Tribunal considered the meaning of the word ‘gallantry’. It said:

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 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.

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.

75. We consider that those words remain apposite and we adopt them for the present purposes.

76. To qualify for the Victoria Cross for Australia, an act of gallantry must be “most conspicuous”. Dictionary definitions of “conspicuous” include “clearly visible; attracting notice or attention” (Concise Oxford Dictionary), “very noticeable or attracting attention” (Cambridge Dictionary), “clearly visible, obvious, discernible” (Collins Dictionary) and “obvious to the eye or mind; attracting attention” (Merriam Webster).

77. As to the concept of “most conspicuous”, the Tribunal said in *Hanuszewicz and the Department of Defence re: Cameron [2019] DHAAT 08* that:

The Tribunal considered that to be ‘most conspicuous’, in the circumstances, his actions would have needed to have directly drawn the attention of the enemy in which case there would have been no question that he was under direct fire from them.

78. The present Tribunal considers that, in saying that, the then-constituted Tribunal was not attempting to define the concept but rather to simply point out a factor that, in the circumstances of that case, indicated that the concept had not been met.

79. In a similar vein, in *Sheean* the Tribunal said:

the Tribunal considers that the enemy's intentions and direct actions would be relevant to a consideration as to whether an act of 'the most conspicuous gallantry' had been performed.

80. Clearly, the Tribunal was not intending in that case to lay out a comprehensive statement of all the various considerations that might be relevant.

81. Whatever considerations are relevant in ascertaining whether an act is conspicuous, it is inherent in the concept of “most conspicuous” that it must be compared to other acts that are conspicuous to ascertain whether it is “most conspicuous”. However, it seems clear to us that the concept does not require that each successive nominee for the Victoria Cross for Australia needs to have performed an act of gallantry that was more conspicuous than that of the last-awarded nominee. That is, we believe the Regulations do not embody an escalating eligibility criterion. Instead, we consider that they set out a constant criterion under which a nominee’s act of gallantry must be comparable to, or rank *pari passu* with, the acts of gallantry of other nominees who have been found to meet the criterion.

82. As to “valour”, dictionary definitions include “great courage” (Cambridge English Dictionary), “great bravery, especially in battle” (Collins English Dictionary) and “strength of mind or spirit that enables a person to encounter danger with firmness: personal bravery” (Merriam Webster).

83. Dictionary definitions of “daring” include “brave and taking risks” (Cambridge English Dictionary), “the courage to do things which might be dangerous or which might shock or anger other people” (Collins English Dictionary) and “venturesomely bold in action or thought” (Merriam Webster).

84. For an act of “valour” to be “daring” as required by the eligibility criteria, it seems to us to be necessary to not simply combine the dictionary meanings of those words. To do so would lead, for example, to a circuitous combined definition of “a brave act of great bravery”. Rather, it seems to us that the combination of “daring” and “act of valour” must, when read in context, necessitate that the act of valour must have some exceptional quality amongst other acts of valour.

85. That this is so seems to be confirmed by the alternative criterion of a “pre-eminent act of valour”. Dictionary definitions of “pre-eminent” include “surpassing all others” (Concise Oxford Dictionary), “more important or better than others” (Cambridge English Dictionary), “If someone or something is pre-eminent in a group, they are more important, powerful, or capable than other people or things in the group” (Collins English Dictionary) and “having paramount rank, dignity, or importance : outstanding, supreme” (Merriam Webster). Notably, there is some apparent conflict amongst these

definitions – must a pre-eminent act be superior to all others, or only superior to others with which it is compared.

86. In *Hanuszewicz* the Tribunal said:

The Tribunal considered that to be ‘pre-eminent’, the act should surpass other comparable acts of valour and to be daring in these circumstances, his actions should be bold and have an element of audacity.

87. To the extent that that comment may be thought to suggest that each successive act of valour must surpass every other previous act of valour, the present Tribunal takes a different view.

88. Consistently with our view of the phrase “most conspicuous”, we consider (as the Tribunal did in *Sheean*), that “pre-eminent” does not require that each successive nominee for the Victoria Cross for Australia needs to have performed an act of valour that was more eminent than that of the last-awarded nominee. We believe the Regulations do not embody an escalating eligibility criterion, but rather a constant criterion under which a nominee’s act of valour must be comparable to, or rank *pari passu* with, the acts of valour of other nominees who have been found to meet the criterion.

89. So far as “self-sacrifice” is concerned, in our view this does not require the ultimate sacrifice. At the same time, death in action of itself is not sufficient to meet this criterion for the Victoria Cross. Self-sacrifice must be either daring or pre-eminent. It must therefore involve a greater risk of death than that inherently involved in any service in the presence of the enemy. The degree of risk must thus be exceptionally beyond that. Consistently with other criteria discussed above, the Tribunal considers that the nominee’s actions must have involved a risk of death comparable to, or ranking *pari passu*, with that displayed by other nominees who have been awarded against this criterion.

90. As to “extreme devotion to duty”, in *Hanuszewicz* the Tribunal said:

As to whether his actions were in the nature of ‘extreme devotion to duty’, the Tribunal was satisfied that Second Lieutenant Cameron was bravely doing his duty as a Troop and Crew Commander. The Tribunal noted that Second Lieutenant Cameron’s evidence suggested that his course of action was well considered and he had thought through the risks to his personal safety and the risk to the group and to Trooper Cadge of him not taking action. Second Lieutenant Cameron was trained to lead the Troop and reacted bravely after weighing his options, deciding on a course of action and mitigating the risk. In the Tribunal’s view, Second Lieutenant Cameron was doing his duty. He did not go above and beyond what was expected of him as a leader and commander, so the performance of his duty in the view of the Tribunal could not reasonably be considered as extreme devotion to duty.

91. Consistently with that, the Tribunal considers that the devotion to duty displayed by a nominee must, to be “extreme”, be exceptionally beyond performance of what could reasonably be expected of a member in the course of their duty in the circumstances in question.

What did Private Norden do?

92. Lieutenant Colonel Hulse put forward a proposed citation of Private Norden in advancing his claim for conferral of the Victoria Cross which set out his summary of the asserted actions of Private Norden. Brigadier Bornholt rightly criticised aspects of this proposed citation – for example, because it asserted that Private Norden had been shot when in fact he had suffered a fragmentation wound, and because it sought to speculate about Private Norden’s state of mind and motivation when he took relevant actions.

93. The Tribunal considers that a far preferable starting point for ascertaining what Private Norden did is to be found in the description of his actions as set out in the recommendation form on the basis of which he was awarded the DCM. This is a contemporaneous record which, as already noted, was written soon after the event by his platoon commander who in turn had consulted eye-witnesses.

94. That description was as follows:

... On 14 May 1968 during Operation Toan Thang, 5th Platoon, B Company came under heavy fire from an estimated squad of Viet Cong. In the initial contact both the forward scout and the section commander were wounded some twenty to thirty metres in front of the remainder of the leading section, which was isolated from the remainder of the platoon due to heavy and accurate enemy fire.

Private Norden, a member of the leading section, asked for covering fire and ran forward under heavy enemy fire to the wounded section commander. He killed one Viet Cong whilst moving forward, and having expended his ammunition recovered the enemy’s automatic weapon which he used against further Viet Cong while assisting the wounded section commander back to the section. Due to this initial action the life of the section commander was saved under intense enemy fire.

Although wounded in his initial move forward Private Norden again advanced to the forward scout. He was fired on by an enemy soldier, but pressed forward and reached the scout killing the Viet Cong who had been using the scout as a shield. Private Norden having determined that the scout was dead, returned to the section, collected grenades and cleared the area so that the body of the scout could be recovered. His three attacks into the enemy position on his own resulted in the enemy position being secured.

Private Norden showed a complete disregard for his own personal safety, and by his courage and devotion to duty ensured the evacuation of a wounded man and the

*recovery of the body of the forward scout. Private Norden personally killed at least three Viet Cong in this action.*³⁰

95. At the hearing the Tribunal sought to test the accuracy of each assertion of fact made in this text by questioning the witnesses called by Lieutenant Colonel Hulse – Messrs Forde, Forster and Barrett.

96. These witnesses confirmed each such assertion with one exception – the references to “Viet Cong” should have been references to soldiers of the North Vietnamese Army. That difference is not without significance, as the latter were generally better trained, better disciplined and better armed than the former, and thereby a more formidable enemy.

97. The Tribunal was thus satisfied that the above description of events was, with that qualification, accurate as far as it went.

98. It then sought to test its adequacy in recording all relevant matters, particularly in respect to those aspects which Brigadier Bornholt argued did not warrant conferral of a Victoria Cross rather than a DCM.

99. Evidence provided by the witnesses was to the effect that:

- a) the ambushing enemy, estimated to be around 7 to 10 in number, attacked from established positions, dug into the ground or in the trees. They had the element of surprise and were all armed with automatic weapons;
- b) the enemy fire that ensued was the most intense that Mr Forde experienced throughout his service;
- c) Private Norden took his actions entirely of his own initiative – he did so without the suggestion of his comrades, and certainly without being ordered to do so;
- d) the ground traversed by Private Norden comprised low shrubs, grass and some trees but provided little cover for him;
- e) Private Norden suffered a shrapnel wound on the first occasion on which he went forward; he lost sufficient blood through this wound for his uniform to be noticeably stained; and the wound was sufficiently severe that it could not be adequately treated in the field and required hospitalisation for two or three days before he was fit to return to duty;
- f) although not mentioned in the 1 RAR Commander’s Diary Narrative, the section commander was so severely wounded that he could not make his own way back to

³⁰ AF-W3121 – Recommendation for Honours or Awards – Private Richard Norden.

the remainder of the section but had to be half carried, half dragged by Private Norden; he was evacuated in-country and then to Australia and never returned to Vietnam;

- g) each of the platoon members to whom Mr Forde spoke at the time and subsequently was of the view that it was almost impossible for Private Norden to survive and that it was a miracle that he did so;
- h) Mr Forde himself assessed the danger of the situation as so severe that, had he been aware of what Private Norden intended to do and had he been physically close enough to Private Norden, he would have ordered him not to do what he did; and
- i) Mr Forde considered that, had Private Norden not cleared the enemy position, there was a very real possibility that, while his entire platoon would likely not have been annihilated, a further 10 or 12 members of it would have been killed.

100. When this further detail is considered, we suggest (without any criticism of Mr Forde's text whatsoever) that a more adequate description might have been as follows:

... On 14 May 1968 during Operation Toan Thang, 5th Platoon, B Company were ambushed and came under heavy fire from an estimated squad of 7-10 North Vietnamese Army regular soldiers in established positions dug into the ground or in trees, each armed with an automatic weapon. In the initial contact both the forward scout and the section commander were wounded some twenty to thirty metres in front of the remainder of the leading section, which was in turn isolated from the remainder of the platoon due to heavy and accurate enemy fire.

Aware that the scout and section commander had been incapacitated and entirely of his own initiative Private Norden, a member of the leading section, asked for covering fire and ran forward to the wounded section commander across ground that provided him little or no effective cover under heavy enemy fire. He killed one NVA soldier whilst moving forward and, having expended his ammunition, recovered that enemy's automatic weapon which he used against further NVA soldiers. He then half-carried, half-dragged the severely wounded section commander back to the section. Due to this initial action the life of the section commander was saved under intense enemy fire.

Although himself relatively seriously wounded in his initial move forward, Private Norden again advanced to the forward scout. He was fired on by an enemy soldier but pressed forward and reached the scout, killing the NVA soldier who had been using the scout as a shield. Private Norden, having determined that the scout was dead, then returned to the section, collected grenades and, moving forward for a third time, cleared the area so that the body of the scout could be recovered. His three attacks into the enemy position on his own resulted in the enemy position being secured and likely saved the lives of other members of the platoon.

Private Norden showed a complete disregard for his own personal safety, and by his selfless acts of courage and devotion to duty ensured the evacuation and saved the life of a severely wounded man, allowed the recovery of the body of the forward scout, and avoided the potential for further deaths of platoon members. Private Norden personally killed at least three NVA soldiers in this action.

Assessing Private Norden's actions against the eligibility criteria

101. There is no doubt that what Private Norden relevantly did was done “in the presence of the enemy”.

102. Private Norden's actions were undoubtedly “gallant” by reference to the test propounded by the Tribunal in *Hanuszewicz*, quoted previously. That this was the case was accepted by the Chief of Army in the decision under review.

103. The Tribunal considers that the evidence establishes that Private Norden performed four separate acts of gallantry:

- a) He ran forward across open ground and under heavy enemy fire, having become aware that the scout and section commander had been incapacitated by wounds inflicted in the initial stage of the enemy ambush;
- b) Having reached the wounded section commander, he engaged with the enemy, killing one, until his ammunition was expended, at which point he used that enemy's weapon to continue to engage and, largely through his own efforts, brought the severely wounded commander back to the remainder of the section;
- c) Although wounded on this first advance, he then returned under enemy fire to where the scout lay and killed the NVA soldier who was using the scout's body as a shield, before again returning to the section;
- d) Having collected grenades, he advanced for a third time and cleared the enemy position, thus allowing the body of the scout to be retrieved and avoiding the risk of further deaths within the platoon.

104. In the view of the Tribunal, each of these acts of gallantry was “conspicuous” and performed in perilous circumstances. They were each visible, obvious, discernible and warranting attention. They were performed in circumstances of great peril. So much was accepted by the Chief of Army in his letter of 24 November 2021, and by Brigadier Bornholt at the hearing. They each thereby met the eligibility criteria for award of the Star of Gallantry to which the DCM is regarded by Defence as an equivalent.

105. As discussed above, whether any of his acts of gallantry should be rated more highly than this and were “most conspicuous” necessarily requires us to consider how they compare

or rank with those of other nominees who have been awarded the Victoria Cross for Australia. While Brigadier Bornholt argued that prior cases were irrelevant and should be ignored, we believe that contention was wrong. Other than by undertaking such comparisons, it is not possible to consider whether the present acts of conspicuous gallantry met the criterion of “most conspicuous”. To seek to assess the degree of conspicuousness in a subjective vacuum would run an extreme risk of generating inconsistent decisions that would undermine the integrity of the honours and awards system and the high respect in which the Victoria Cross is and must continue to be held. The very use of the word “most” demands comparison.

106. Lieutenant Colonel Hulse drew the attention of the Tribunal to the citations for a number of previous grants of the Victoria Cross, being those for:

- a) Trooper Mark Donaldson VC;
- b) Corporal Benjamin Roberts-Smith VC, MG ;
- c) Corporal Cameron Baird VC, MG;
- d) Corporal Daniel Keighran VC;
- e) Major Peter Badcoe VC;
- f) Warrant Officer Class 2 Keith Payne VC;
- g) Warrant Officer Class 2 Kevin Wheatley VC;
- h) Warrant Officer Class 2 Ray Simpson VC; and
- i) Lance Corporal Walter Peeler VC.

107. In doing so, he argued that various words and phrases used in those citations were equally applicable to Private Norden. However, we do not think that is the relevant basis for comparison. Rather, it is the acts attested to in previous citations that need to be compared with the acts of Private Norden, and not simply the words that were used to describe them.

108. In looking at these precedents, the Tribunal acknowledges immediately that no two cases are the same and that each case must be assessed on its merits. In assessing comparability due allowance needs to be made for such differences.

109. The Tribunal considers that the acts attested to in some of these citations are so materially different to the acts of Private Norden that they do not assist in assessing whether Private Norden’s actions were “most conspicuous”. For this reason, we have not given further consideration to the citations for Messrs Roberts-Smith, Keighran, Payne, Wheatley and Peeler.

110. However, other citations do attest to actions of the recipient that bear a far closer similarity to the acts of Private Norden.

111. The citation for Trooper Donaldson attested that, when his patrol was ambushed by a numerically superior, entrenched and coordinated enemy and suffered numerous casualties, completely lost the initiative and became immediately suppressed, he reacted spontaneously to regain the initiative and exposed himself to enemy fire in order to draw attention to himself and away from the wounded, thus buying enough time for the wounded to be moved to relative safety. Additionally, at a later stage of the action, he moved alone across around 80 metres of exposed ground and under intense and accurate enemy machine gun fire from entrenched positions to reach a severely wounded coalition force interpreter who had been inadvertently left behind, picked up the interpreter, carried him back to relative safety and provided immediate first aid (which he also did for other wounded soldiers while continually engaging the enemy). Trooper Donaldson received the Victoria Cross for “exceptional gallantry”.

112. The citation for Corporal Baird attested that, after his team was engaged by small arms fire from several enemy positions, he seized the initiative, leading his team to neutralise the positions, killing six enemy combatants. Soon after, when an adjacent team came under heavy enemy fire and its commander was seriously wounded, Corporal Baird led his team to provide support during which they were engaged by rifle and machine gun fire from prepared enemy positions. With complete disregard for his own safety, Corporal Baird charged toward the enemy positions, supported by his team. When they were engaged by additional enemy on their flank, Corporal Baird instinctively neutralised the new threat with grenades and rifle fire. With that enemy position now isolated, Corporal Baird manoeuvred and was engaged by enemy machine gun fire, the bullets striking the ground around him. Displaying great valour, he drew the fire, moved to cover, and suppressed the enemy machine gun position, enabling his team to close on the entrance to the prepared position and regain the initiative. On three occasions Corporal Baird charged an enemy-held building within the prepared compound. On the first he was totally exposed and engaged by enemy fire but pushed forward until forced to withdraw when his rifle ceased to function. On rectifying his rifle, he advanced again, once more under heavy fire, until he had to take cover to reload. On the third occasion, he selflessly drew enemy fire away from his team and assaulted the doorway, when the enemy was neutralised and the advantage regained. Corporal Baird was killed in the effort. He received the Victoria Cross of “acts of valour and self-sacrifice”.

113. The citation for Major Badcoe attested that his award was for his action on three occasions, on one of which he moved alone across 600 metres of fire swept ground to reach a sector advisor who had been killed and a medical advisor who had been wounded and was in immediate danger from the enemy in a machine gun position within 50 metres. He attended to the wounded officer and ensured his future safety, then organised and led a platoon towards the enemy post which they successfully assaulted and captured, during which attack he personally killed the machine gunners directly in front of him. He then picked up the body of the dead officer and ran back to the command post over open ground still covered by enemy fire. Major Badcoe received the Victoria Cross for “conspicuous gallantry and ... valour”.

114. The citation for Warrant Officer Class 2 Simpson attested that, when one of his platoons became heavily engaged with the enemy, he led the remainder of his company to its assistance and, disregarding the dangers involved, placed himself at the front of his troops and personally led the assault on the left flank of the enemy. As the enemy moved forward, an Australian warrant officer commanding one of the platoons was seriously wounded and began to falter. Warrant Officer Simpson, at great personal risk and under heavy enemy fire, moved across open ground, reached the wounded officer and carried him to a position of safety. He then returned to his company where he crawled forward to within ten metres of the enemy and threw grenades into their positions. Being unable to break their position, he threw smoke grenades and, carrying a wounded platoon leader, covered the withdrawal of the company. On a second occasion, five days later, Warrant Officer Simpson moved forward in the face of accurate enemy machine gun fire to cover the initial evacuation of casualties, which he directed. Then, at the risk of almost certain death, he made several attempts to move forward towards the body of his battalion commander, but on each occasion was stopped by heavy fire and so, alone and still under enemy fire, covered the withdrawal of the wounded by personally placing himself between the wounded and the enemy. Warrant Officer Simpson received the Victoria Cross for “conspicuous gallantry”.

115. In the view of the Tribunal, while clearly not identical, there is a high degree of comparability in the citations of Messrs Donaldson, Baird, Badcoe and Simpson with the facts as set out above about what was done by Private Norden.

116. The Tribunal identified at paragraph 103 above four acts of Private Norden that it considered to be acts of conspicuous gallantry performed in perilous circumstances. As such, each of these individual acts would have qualified Private Norden for the Star of Gallantry (the equivalent of the DCM he was awarded).

117. However, the Tribunal further considers that the second, third and fourth of those acts also meet the higher criterion of being “most conspicuous” by reason of their comparability with those previous grants of the Victoria Cross.

118. On his first advance, Private Norden reached the wounded commander. Having ascertained that he was so seriously wounded that he needed strenuous assistance to get him back to the section, during which he would be either unable or at least heavily disadvantaged in protecting himself, Private Norden could have left him there and returned to the section to secure additional assistance in subduing the enemy in order to effect a rescue. Instead, he engaged proactively with the enemy. Then, having exhausted his own ammunition, he could have sought to retreat to the remainder of the section and stayed there. Instead, he stood his ground and fought on using the weapon of the enemy soldier he had killed, and then exposed himself to further enemy fire while bringing the severely wounded section commander back.

119. Having reached the comparative safety of the remainder of the section, he then made two further forays notwithstanding that he must have then known of the extreme danger that doing so entailed.

120. On the second advance he reached the scout and found that he had died. Knowing that he could not be saved, Private Norden could have returned to the remainder of the section and stayed then until the enemy was overcome by the combined efforts of himself and his comrades. Instead, he advanced for the third time and overcame the enemy single-handedly.

121. On the basis of the above analysis, we consider that it is fully justifiable to conclude that Private Norden by these three acts met the eligibility criterion of the most conspicuous gallantry in the presence of the enemy.

122. While that would of itself be sufficient for the Tribunal to recommend that the Minister recommend the grant of the Victoria Cross for Australia to Private Norden, the Tribunal has additionally considered the remaining eligibility criteria.

123. The Tribunal considers that each of the four acts of gallantry identified above was also an act of valour in that they demonstrated “great courage”, “great bravery in battle” and a “strength of mind or spirit that enabled him to confront danger with fairness”.

124. In the view of the Tribunal, each of second, third and fourth of these acts of valour was “daring” as they demonstrated, to an exceptional degree, bravery and taking risks, the courage to do dangerous things and being venturously bold in action. On this basis also, Private Norden’s actions met a second eligibility criterion for the Victoria Cross for Australia.

125. Whether those acts of valour were also “pre-eminent” is, in our view, to be judged by ascertaining whether they were sufficiently comparable to acts of valour by other nominees who have been awarded the Victoria Cross for Australia. In the view of the Tribunal, there is again a high degree of comparability in the actions attested to in the citations of Messrs Donaldson, Baird, Badcoe and Simpson with the facts as set out above of what was done by Private Norden. On this basis also, the Tribunal considers that Private Norden’s actions met the third eligibility criterion for the Victoria Cross for Australia.

126. So far as “self-sacrifice” is concerned, it is clear that Private Norden put his life at great risk in doing what he did. Whether that risk should be “taken as a 90% possibility of being killed in performing the deed” as set out in the Pamphlet on Military Honours and Awards 1960 which was the guidance in place for the Vietnam War is a question that is probably impossible to answer. In our view, that test proposes a level of arithmetic accuracy that is unattainable.

127. More relevantly, perhaps, the Tribunal considers that his actions must have involved a risk of death comparable to, or ranking *pari passu*, with that assumed by other nominees who have been awarded the Victoria Cross, and in particular as evidenced by the citations for Messrs Donaldson, Baird, Badcoe and Simpson. The extremely high risk of death that he assumed was in our view both daring and pre-eminent. On this basis also, in the Tribunal's view Private Norden's actions met the fourth and fifth eligibility criteria for the Victoria Cross for Australia.

128. The final eligibility criterion relates to extreme devotion to duty. As previously indicated, in our view this requires a degree of devotion that is exceptionally beyond performance of what could reasonably be expected of a member in the course of their duty in the circumstances in question.

129. On learning that the scout and section commander had been wounded by heavy fire from an entrenched enemy position, Private Norden could have taken cover and sought to engage with the enemy in a reactive manner. Had he done so, we consider he would have been doing his duty and could have been subject to no criticism whatsoever. As noted above, Mr Forde gave evidence at the hearing that, had he been close enough to Private Norden to be advised what he intended to do, he would have given him a direct order not to do what he in fact did. This in our opinion is evidence that Private Norden's actions could not reasonably have been expected of him. Instead, Private Norden, at great personal risk, chose to engage proactively with the enemy and, in so doing, saved at least one life and possibly more. He clearly did more than his duty demanded.

130. Given the nature of his second, third and fourth acts of gallantry and valour and the attendant risk, it is our view that what he did was "exceptionally beyond" reasonable expectations and that accordingly he also met the sixth and final eligibility criterion of extreme devotion to duty.

Exercise of the prerogative power

131. A finding that Private Norden met the eligibility criteria for the Victoria Cross for Australia does not necessarily mean that that honour should be conferred.

132. Letters Patent and accompanying Regulations do not confer a right or entitlement on a person who meets the eligibility criteria set out therein to have conferred a defence honour or award.

133. The Victoria Cross Regulations, after setting out the eligibility criteria, then specify the categories of persons to whom that honour "may" be awarded.

134. Defence honours and awards are conferred in exercise of the prerogative power of the Commonwealth and there may be valid countervailing reasons why, in exercise of that prerogative, an honour or award should not be conferred on a person who otherwise meets the eligibility criteria.

135. In its oral and written submissions to the Tribunal, Defence did not argue that there were countervailing reasons why the Victoria Cross for Australia should not be awarded to Private Norden if the Tribunal found that he had met the eligibility criteria. Rather, it simply argued that he did not meet those criteria and that the DCM was the appropriate recognition for his acts of gallantry.

136. Nevertheless, having rejected that argument, the Tribunal considers it appropriate to address the issue of countervailing reasons as this will need to be considered by the Minister in deciding whether or not to recommend to the Governor-General that the Victoria Cross for Australia should be awarded to Private Norden.

137. Sound countervailing reasons may exist, for example, where a person, in addition to performing acts that meet relevant eligibility criteria, has also committed a separate act that is so reprehensible that awarding a defence honour would undermine the very integrity of the defence honours and awards system.

138. The Tribunal has thus examined the entirety of Private Norden's service file. There is nothing in that file that would reasonably sustain any claim of a countervailing reason. While the file does disclose three infractions by him, these were relatively trivial:

- a) between enlistment on 27 April 1966 and the events of 14 May 1968, one infraction is recorded – as a very recent recruit, on 7 July 1966 he took drill cartridges on a rifle range, in contravention of standing orders, and was confined to barracks for 7 days;
- b) on 18 July 1968, relatively soon after the events of 14 May, he violated curfew at Vung Tau and was fined \$10; and
- c) on 26 April 1969, he was absent without leave for 10 hours, fined \$10 and forfeited 1 day's pay and allowances.

139. The first two of these events were obviously not considered sufficient to preclude the award of the DCM in August 1968 and the third was of a similar nature. Thus, none should now be considered any reason for withholding the award of the Victoria Cross for Australia.

140. After returning to duty following treatment for the wound he suffered on 14 May 1968, Private Norden was again wounded in action on 5 August 1968. This wound was of sufficient severity that he was hospitalised and, following release from hospital, he was medevaced from theatre and left Vietnam on 13 August 1968.

141. Following discharge from the Army after completion of his term of enlistment on 12 April 1969, Private Norden served with the Australian Capital Territory Police when, on 26 October 1972, he was involved in a traffic collision while on duty and succumbed to his injuries a few days later. So far as the Tribunal is aware, his police service was unblemished.

142. The fact that the Richard Norden DCM Club within the Duntroon Garrison was posthumously named in his honour stands as further evidence that there is nothing in Private Norden's personal conduct that could reasonably be regarded as sustaining a countervailing reason for denying the award of the Victoria Cross for Australia.

143. The Tribunal has also considered whether the opinions formed by Messrs Bennett, Hughes and MacDonald in 1968 or the reasons and decision of Lieutenant General Burr might ground a sufficient countervailing reason. As we have already stated, these are each senior military officers of great experience and their judgement should not be lightly dismissed.

144. However, as detailed above, each of them formed their views on the basis of limited factual evidence and, in the case of Lieutenant General Burr, by reference to advice based on considerations that are incompatible with the requirement that the Tribunal must ascertain the correct or preferable decision after assessing all relevant evidence.

145. The Tribunal, through its hearing process, has ascertained additional factual eye-witness evidence that was unavailable to any of these previous decision-makers. While they each had access to the description of the events of 14 May 1968 that was in essence written by Mr Forde and this was generally accurate as far as it went, it is now apparent that, through no fault of Mr Forde, it was not an adequate record of all relevant facts. As a result of the review process, the Tribunal now has the added advantage of access to further evidentiary detail which, taken in conjunction with the evidence previously available, compels in its view a conclusion that Private Norden's actions fully met the rigorous eligibility criteria of the Victoria Cross for Australia.

146. Further, the administrative process by which the honours recommendation was placed before Messrs Bennett, Hughes and MacDonald may be viewed as deficient in various respects:

- a) the wording describing the action of 14 May 1968 which appeared on the recommendation form was largely prepared by Mr Forde when ordered by a more senior officer to "write someone up for a decoration";

- b) he did so shortly after the battle, when he was physically and mentally exhausted and was not further consulted about what he wrote;
- c) he had no training or background in preparing such a document and was given no guidance as to relevant considerations – in particular, he had no knowledge of what honours or awards might relevantly be considered or what their eligibility criteria might have been, and he did not have access to the Pamphlet on Military Honours and Awards 1960 which was the guidance in place during the Vietnam War; and
- d) the decision to recommend the DCM was made without seeking any eye-witness corroboration or elaboration of what Mr Forde wrote.

147. Similarly, the administrative process by which Lieutenant General Burr reached the decision under review may also be regarded as deficient:

- a) the submission put to him for that purpose, and its accompanying report, considered only the questions of whether Lieutenant Colonel Hulse had adduced any compelling new evidence that had not been before Messrs Bennett, Hughes and MacDonald;
- b) those limited questions are inconsistent with a merits review process designed to identify the correct or preferable decision; and
- c) he was not provided with, and did not undertake, any analysis of the merits (or otherwise) of the decisions previously taken by Messrs Bennett, Hughes and MacDonald.

148. Accordingly, the Tribunal considers that the fact that Messrs Bennett, Hughes, MacDonald and Burr had each come to a conclusion different to that now reached by the Tribunal does not provide a reasonable basis for a countervailing reason when it is realised that none of these distinguished officers had the benefit of awareness of all relevant facts.

149. The Tribunal has also considered whether or not the fact that the application for a Victoria Cross for Australia was not made until some 52 years after the event provides any countervailing reason why that honour should not now be conferred. It may in some circumstances be extremely difficult to deal with an application for such retrospective recognition where the passage of time means that reliable evidence is no longer available to be adduced or tested. However, this is not such a case. Eye-witness evidence was brought before the Tribunal and carefully tested by it, leading the Tribunal to deem it fully reliable and accurate. In those circumstances, the mere fact that 54 years have now passed since the original decision to award Private Norden a DCM rather than a Victoria Cross does not constitute a countervailing reason why that decision should not now be retrospectively varied.

150. Finally, the Tribunal has been unable to identify any other factor that may give rise to a sound countervailing reason why, having fully met the eligibility criteria, Private Norden should nevertheless not now be awarded the Victoria Cross for Australia.

Draft citation

151. Having concluded that Private Norden met the eligibility criteria for the Victoria Cross for Australia and that there is no countervailing reason to not award that honour, the Tribunal suggests that the following draft citation would be appropriate to accompany the conferral of that honour:

For most conspicuous acts of gallantry, for pre-eminent acts of valour and self-sacrifice, and for extreme devotion to duty in the 'AO Surfers' Area of Operations in the Bien Hoa province, Vietnam, on 14 May 1968 during the Battle of Fire Support Base Coral.

Private Richard Norden enlisted in the Australian Army on 27 April 1966 and discharged three years later, having completed his three-year period of service. He arrived in Vietnam on 5 December 1967, on posting to 1 Australian Reinforcement Unit. On 31 January 1968, he was posted to the 7th Battalion, the Royal Australian Regiment, and on 10 April 1968 was posted to the 1st Battalion, the Royal Australian Regiment. He left Vietnam on 13 August 1968 after being wounded in action on 5 August 1968.

On 14 May 1968 during Operation Toan Thang, 5th Platoon, B Company were ambushed and came under heavy fire from an estimated squad of 7-10 North Vietnamese Army regular soldiers in established positions dug into the ground or in trees, each armed with an automatic weapon. In the initial contact both the forward scout and the section commander were wounded some twenty to thirty metres in front of the remainder of the leading section, which was in turn isolated from the remainder of the platoon due to heavy and accurate enemy fire.

Aware that the scout and section commander had been incapacitated and entirely of his own initiative Private Norden, a member of the leading section, asked for covering fire and ran forward to the wounded section commander across ground that provided him little or no effective cover under heavy enemy fire. He killed one NVA soldier whilst moving forward and, having expended his ammunition, recovered that enemy's automatic weapon which he used against further NVA soldiers. He then half-carried, half-dragged the severely wounded section commander back to the section. Due to this initial action the life of the section commander was saved under intense enemy fire.

Although himself relatively seriously wounded in his initial move forward, Private Norden again advanced to the forward scout. He was fired on by an enemy soldier but pressed forward and reached the scout, killing the NVA soldier who had been

using the scout as a shield. Private Norden, having determined that the scout was dead, then returned to the section, collected grenades and, moving forward for a third time, cleared the area so that the body of the scout could be recovered. His three attacks into the enemy position on his own resulted in the enemy position being secured and likely saved the lives of other members of the platoon.

Private Norden showed a complete disregard for his own personal safety, and by his courage, selfless acts and devotion to duty ensured the evacuation and saved the life of a severely wounded man, allowed the recovery of the body of the forward scout, and avoided the potential for further deaths of platoon members. Private Norden personally killed at least three NVA soldiers in this action.

Tribunal decision

152. In light of all of the above, the Tribunal has decided to recommend to the Minister that:

- (a) the decision of the Chief of Army, Lieutenant General Rick Burr AO, DSC, MVO to refuse to recommend the late Private Richard Norden DCM for the Victoria Cross for Australia should be rejected; and
- (b) the Minister should instead recommend to the Governor-General that Private Richard Norden should be awarded the Victoria Cross for Australia.

Further, the Tribunal suggests that the draft citation set out in the preceding paragraph of these reasons be considered as appropriate to accompany conferral of such an honour.