



Australian Government

Defence Honours and Awards Appeals Tribunal

Gilbert and the Department of Defence [2022] DHAAT 16 (14 November 2022)

File Number 2022/005

Re **Lieutenant Colonel Gregory Gilbert DSM (Retd)**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Stephen Skehill (Presiding Member)
Major General Mark Kelly AO DSC (Retd)
Ms Josephine Lumb

Appearances Air Vice-Marshal John Quaipe AM (Retd)
Honours Review Officer, Directorate of Honours and Awards,
Department of Defence

Hearing Date 24 October 2022

DECISION

On 14 November 2022, the Tribunal decided to recommend to the Minister that the decision of Ms Petrina Cole of the Directorate of Honours and Awards in the Department of Defence to refuse to recommend Lieutenant Colonel Gilbert for the Distinguished Service Cross be affirmed.

CATCHWORDS

DEFENCE HONOUR – Distinguished Service Decorations - Distinguished Service Cross – Distinguished Service Medal – Distinguished Service Medal already awarded – Vietnam – Battle of Núi L  – Forward Observer

LEGISLATION

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

Defence Regulation 2016 Section 35

Distinguished Service Decorations

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

Introduction

1. The Applicant, Lieutenant Colonel Gregory Gilbert DSM (Retd) seeks review of a decision of Ms Petrina Cole, then Director Honours and Awards in the Department of Defence, that he not be recommended for the Distinguished Service Cross (DSC) for his service at the Battle of Núi L  in South Vietnam between 19 and 22 September 1971.

Background to this review

2. On 15 February 2015, Lieutenant Colonel Gilbert made application to the Directorate of Honours and Awards in the Department of Defence (the Directorate) seeking that his ‘critical role in the Battle of Núi L  in South Vietnam between 19 and 22 September 1971 be officially recognised by the awarding of the Medal for Gallantry (MG)’.¹

3. Lieutenant Colonel (then Captain) Gilbert was an Artillery Forward Observer from 104th Field Battery attached in direct support of Delta Company, 4th Battalion, the Royal Australian Regiment (4 RAR) during Operation IVANHOE. The subject action occurred on 21 September 1971. He stated that he was ‘prosecuting this application based on maladministration at the time of the operation and thereafter in South Vietnam’. Lieutenant Colonel Gilbert initially received no recognition for his part in the action and asserted that ‘I believe that, if the full details of my role in the battle were known at the time, and the quota system allowed it, I would have been awarded a Military Cross (MC)’.

4. Almost three years after submitting his application, Lieutenant Colonel Gilbert was advised on 10 November 2017 that, following a decision by the then Chief of Army, Lieutenant General Angus Campbell AO DSC, he would be awarded the Distinguished Service Medal (DSM) for ‘distinguished leadership in warlike operations’. The decoration was scheduled in the Commonwealth of Australia Gazette on 6 February 2018.²

5. On 18 May 2018 Lieutenant Colonel Gilbert made application to the Tribunal for review of the decision to award him the DSM and, thereby, to refuse his application for the MG.³ He stated that the award was inappropriate to the circumstances he had described in his submission and that the citation for the DSM incorrectly characterised the hazardous circumstances in which the battle was fought as ‘warlike operations’ when in fact he was ‘in action, in close combat with the enemy’. He stated in the application for review that ‘the award of the Medal for Gallantry is the appropriate award’ and sought to have the DSM replaced with the MG.

¹ Letter from Lieutenant Colonel Gilbert to the Directorate dated 15 February 2015.

² *Commonwealth of Australia Gazette* dated 6 February 2018.

³ Letter from Lieutenant Colonel Gilbert to the Tribunal dated 18 May 2018.

6. The matter proceeded to hearing on 14 February 2019 and on 7 March 2019 the Tribunal decided to recommend to the Minister for Defence Personnel that the decision by the Chief of Army to recommend to the Governor-General that Lieutenant Colonel Gilbert be awarded the DSM be affirmed. In making this decision, the Tribunal stated that it agreed with the Chief of Army's decision to recommend Lieutenant Colonel Gilbert for the DSM for the above service. The Tribunal stated that, in making that recommendation, the Tribunal decided that Lieutenant Colonel Gilbert was not eligible for the award that he had applied for – the MG.

7. The Tribunal however recommended that the citation for Lieutenant Colonel Gilbert's Distinguished Service Medal be amended to accurately reflect the extent of his actions on 21 September 1971. These recommendations were subsequently accepted.

8. On 26 March 2019, less than three weeks after the Tribunal's decision, Lieutenant Colonel Gilbert wrote directly to General Campbell attempting to clarify the circumstances surrounding the 2018 award of the DSM. In doing so, Lieutenant Colonel Gilbert criticised Defence's research leading up to this award, and made reference to a Defence submission from his Tribunal review, to the effect that General Campbell's decision to recommend Lieutenant Colonel Gilbert for the DSM was based on his 'co-ordination of offensive fire support capabilities in complex and technically challenging circumstances'.

9. Lieutenant Colonel Gilbert stated that his appeal was not based on 'co-ordination of offensive fire support capabilities in complex and technically challenging circumstances' but 'providing fire support without regard to (his) own safety whilst being shot at with rifle and machine gun fire aimed at (him) by members of the North Vietnamese Army who were positioned approximately 25 metres away', and based on putting himself at risk to bring in artillery to protect the company. Lieutenant Colonel Gilbert went on to state that submitted his appeal because of his 'conviction of what (he) had done in hazardous circumstances was comparable to similar acts during the Vietnam War which resulted in gallantry awards', and his 'equally strong conviction that what (he) had done did not fit the criteria for the DSM, and was in no way comparable to contemporary awards of the DSM which were for meritorious service in non-hazardous circumstances which did not involve contact with the enemy'.

10. On 29 April 2019, General Campbell replied to Lieutenant Colonel Gilbert stating that he did consider all available material in reaching his decision, and while he acknowledged that Lieutenant Colonel Gilbert was under fire throughout his co-ordination of offensive fire support, this did not automatically result in medallic recognition being aligned with gallantry. General Campbell stated that he gave great weight to his 'outstanding demonstration of technical expertise and (his) calm determination during dangerous and challenging circumstances' and went on to state that 'your efforts were aligned to the best examples of leadership on warlike operations and accordingly recommended you for the award of the (DSM)'.

11. Almost two years later, on 15 February 2021, Lieutenant Colonel Gilbert wrote to the Tribunal, citing the Tribunal's decision in *Hulse and the Department of Defence re: Jensen*. In that case, an application was made for Lieutenant Colonel Jensen to be awarded the DSC, however an MG was recommended (and later awarded) instead.

12. Lieutenant Colonel Gilbert asked:

“My first issue is whether the then CA (now the CDF) exceeded his legal authority after rejecting my submission for the award of the MG by awarding the DSM without my having been afforded the opportunity of appealing the rejection of my submission for the MG. In other words, should my appeal have properly been regarding the rejection of my submission for an MG and not regarding the awarding of the DSM?”

13. Lieutenant Colonel Gilbert also enquired as to whether he was able to apply for the award of the DSC to recognise his actions on 21 September 1971.

14. Lieutenant Colonel Gilbert's attention was drawn to paragraph six of the Tribunal's decision which stated that it was satisfied that his letter to the Directorate of Honours and Awards of 15 February 2015 constituted an application (for the Medal for Gallantry) and that the subsequent award of the DSM on 6 February 2018 constituted a refusal to recommend him for the MG. The advice went on to state that the Tribunal's reasons for decision made clear that it considered whether that refusal was the correct or preferable decision, and the Tribunal concluded that it was. Further, Lieutenant Colonel Gilbert was also advised that the Tribunal also considered whether the award of the DSM was appropriate, and concluded that it was.

15. Lieutenant Colonel Gilbert was further advised that if he wished to pursue the award of the DSC to recognise his actions on 21 September 1971, he should make application to Defence, rather than to the Tribunal, in the first instance.

16. On 15 April 2021, Lieutenant Colonel Gilbert wrote to the Directorate seeking that his service at the Battle of Núi Lé be officially recognised by the awarding of the Distinguished Service Cross (DSC). In doing so, Lieutenant Colonel Gilbert stated that ‘as a result of reading the Tribunal's reasoning and decision, I realised that my original submission to be awarded the MG was misguided and that my submission should have been for the award of the DSC’ and that since his appeal was appealing the rejection of the MG, the Tribunal had advised him that his proper course of action was to apply to Defence for the award of the DSC if he wished to pursue that issue.

17. In doing so, Lieutenant Colonel Gilbert stated that the principal difference between the criteria of the DSC and the DSM is command, noting they are both awarded for distinguished leadership in warlike operations, but that the DSC has the additional criterion of ‘distinguished command’. He went on to state that having endorsed the award of the DSM by Defence, it could be assumed that both Defence and the Tribunal were

satisfied that he exhibited distinguished leadership, and went on to argue a case that he exhibited distinguished command on 21 September 1971.

Decision under review

18. On 3 November 2021, Ms Cole responded to Lieutenant Colonel Gilbert stating that in response to his 2015 application for recognition, General Campbell had considered his actions and assessed that they had not been appropriately recognised, and that General Campbell had sought to rectify this with the award of ‘an appropriate contemporary award which was commensurate with the technical mastery and leadership’ shown by Lieutenant Colonel Gilbert through his decisions in the Battle of Núi Lé.

19. Ms Cole stated that the outcome of this assessment was a determination that the DSM most adequately recognised his significant contribution to the Battle, and that the decision had been affirmed by the Tribunal review. Ms Cole drew Lieutenant Colonel Gilbert’s attention to paragraph 101 of the Tribunal’s decision, which stated that the Tribunal assessed ‘the appropriateness of the...DSM’.

20. On 7 March 2022, Lieutenant Colonel Gilbert applied to the Tribunal seeking review of Ms Cole’s decision. In doing so, Lieutenant Colonel Gilbert stated that Ms Cole failed to address the arguments made in his submission, and that his application was based on the DSC being the more appropriate award than the DSM, in the circumstances.

Tribunal jurisdiction

21. 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 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. The DSC is included in the defence honours listed in Regulation 35. Therefore, the Tribunal has jurisdiction to review refusal decisions in relation to this defence honour.

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

Conduct of the review

23. In accordance with its Procedural Rules, on 18 March 2022, the Tribunal wrote to the Secretary of the Department of Defence informing him of Lieutenant Colonel Gilbert's application for review.⁴ The Tribunal requested a merits-based assessment of Lieutenant Colonel Gilbert's actions against the eligibility criteria for the DSC 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.

24. On 16 June 2022, Mr Ian Heldon, Director of Honours and Awards in the Department of Defence provided a submission, on behalf of Defence.⁵ Mr Heldon stated that it is Defence's view that Ms Cole's letter was not a new decision refusing an application and that Lieutenant Colonel Gilbert's most recent application should be dismissed by the Tribunal under Section 110VC(1)(b) of the Act on the grounds that the matter has already been adequately reviewed. Mr Heldon advised that Defence does not consider the allocation of resources to conduct further review to be warranted or appropriate considering it would be effectively reviewing the 2019 decision of the Tribunal.

25. The Defence submission was forwarded to Lieutenant Colonel Gilbert for comment on 17 June 2022. Lieutenant Colonel Gilbert responded with his comments on 18 July 2022.

26. At the hearing on 24 October 2022, Defence's representative, Air-Vice Marshal John Quaipe AM (Retd), did not press the argument that Ms Cole's letter was not a new decision refusing an application. Had that argument been correct, the Tribunal would not have had jurisdiction to hear and determine the present application by Lieutenant Colonel Gilbert. The Tribunal indicated that, had Defence pressed that argument, it would have rejected it as, in its view, Ms Cole's letter had substantively refused to recommend Lieutenant Colonel Gilbert for the DSC.

27. At the hearing Defence did also not press the argument that Lieutenant Colonel Gilbert's application should be dismissed because it had already been adequately reviewed. The Chair noted that, had Defence pressed that argument, he would have rejected it because he was not satisfied, on the basis if the documents supplied by Defence, that award of the DSC rather than the DSM had been considered by the Department or that the Tribunal had previously considered any honour other than the DSM or the Commendation for Distinguished Service.

⁴ Letter, Tribunal to Secretary, DHAAT/OUT/2021/513, dated 11 November 2021.

⁵ Directorate of Honours and Awards letter to the Tribunal DH&A OUT/2021/0038 dated 21 December 2021.

28. At the hearing Defence agreed that, if the eligibility criteria for the DSC were met, there was no reason why that honour could not be awarded retrospectively to Lieutenant Colonel Gilbert. Defence also stated that it would not argue that the previous decision should not be varied because Lieutenant Colonel Gilbert had not produced compelling new evidence or proof that the previous decision was affected by maladministration.

29. In light of the above, Defence agreed that the key issue before the Tribunal in the present proceedings was whether Lieutenant Colonel Gilbert had displayed distinguished command as well as the distinguished leadership which had been previously accepted by both the Department and the Tribunal.

Lieutenant Colonel Gilbert's service

30. Lieutenant Colonel Gilbert entered the Royal Military College - Duntroon on 29 January 1965 and graduated on 10 December 1968. He was allocated to the Royal Regiment of Australian Artillery. After basic officer training at the School of Artillery he was posted to the 12th Field Regiment at Holsworthy on 8 March 1969. During 1969 and 1970 he underwent further training to become qualified as a Forward Observer and deployed to Vietnam with his Regiment on 4 May 1971.

31. In June 1971 Lieutenant Colonel Gilbert was attached to Delta Company, 4 RAR as their Forward Observer and he remained in that role until 7 November 1971 when he returned to his Regiment at Vung Tau.⁶

32. Following his tour of Vietnam, Lieutenant Colonel Gilbert served in a variety of corps, staff and training appointments. He was promoted to Major in March 1976 and to Lieutenant Colonel on 30 August 1982. After a number of postings in Canberra he transferred to the Inactive Army Reserve on 13 April 1986.

33. For his service in the Army Lieutenant Colonel Gilbert has received the following honours and awards:

- Distinguished Service Medal
- Australian Active Service Medal 1945-75 with Clasp 'VIETNAM';
- Vietnam Medal;
- National Medal;
- Defence Force Service Medal;
- Australian Defence Medal; and
- Republic of Vietnam Campaign Medal.

⁶ Oral Evidence Lieutenant Colonel Gilbert, Canberra 14 February 2018

Background to the Action

34. The Army Report to the 2019 review states that the action occurred during Operation IVANHOE, a Task Force search and destroy mission conducted in the north of Phuoc Tuy Province from 19 to 22 September 1971.⁷ The action took place in thick jungle south east of the de Courtenay rubber plantation commencing on the morning of 21 September 1971 and continuing throughout the afternoon and evening. It would become known as the Battle of Núi Lé and was the last major engagement of the Vietnam War for Australian forces.

35. Intelligence reports had indicated that a significant number of enemy troops from 274 Viet Cong Main Force Regiment and 33 Regiment of the People's Army of Vietnam were returning to the de Courtenay area to refit and rearm. Having pinpointed their location and tracking their movements, the Task Force operation commenced with a mission to close with and destroy the enemy before they could disrupt the planned Australian withdrawal from the Province which was scheduled for November 1971.

36. The plan was to block the enemy in the east whilst two companies from 4 RAR (Bravo and Delta) closed from the west. The operation commenced on 19 September when Delta Company were resupplied and issued orders to commence patrolling to their south east. As they were preparing to move, they received updated intelligence that at least one and possibly two battalions of main force enemy troops were in the area into which they would be patrolling.

Official Accounts of the Action

37. **The Battle.** The Official History – *Fighting to the Finish, the Australian Army and the Vietnam War, 1968-1975* - contains a synopsis of the action taken from extensive after-action reports and commanders' diaries as well as individual accounts.⁸ An edited version of that synopsis follows, focussing on the actions of Delta Company under the command of Major Jerry Taylor:

In the early afternoon of 20 September, 11 Platoon D Company had the first contact of the operation when they encountered a party of 15 enemy on a track north east of Nui Sao. The platoon opened fire and the enemy reacted instantly and aggressively. The Australians killed two in the brief firefight without

⁷ Report Into Category 3 Public Submission to the Inquiry into Unresolved Recognition for Past Acts of Naval and Military Gallantry – Captain Gregory Vivian Gilbert, R28416994 dated April 2017, p.3-4, para 16-20.

⁸ Ashley Ekins with Ian McNeill, *Fighting to the Finish, the Australian Army and the Vietnam War, 1968-1975*, Allen & Unwin in conjunction with the Australian War Memorial, 2012, p.613-619.

incurring casualties themselves. Examination of the enemy dead showed they were NVA regular soldiers.

On the morning of 21 September, D Company ran into heavy opposition. At about 9 a.m. while following a track, 12 Platoon came under heavy fire from an enemy bunker just ten metres away. RPG rounds killed machine gunner Private Duff instantly and wounded two others including the platoon commander Second Lieutenant Spinkston. Private Kemp crawled forward and tried repeatedly to retrieve Duff's body under intense fire until he was ordered to withdraw. With the forward section pinned down, artillery and then air support was called in while the other two platoons moved in to assist. As 11 Platoon approached, they encountered another enemy group and after a brief fire fight drove them off. The platoon continued to repel repeated attacks over the next two hours. With the enemy attempting to outflank them, 11 Platoon was running short of ammunition when the Commanding Officer, Lieutenant Colonel Hughes dropped supplies to them from his observation helicopter.

From the air, it appeared that D Company had struck the western edge of a large bunker system. Major Taylor ordered his platoons to hold their positions while air and artillery fire support was called in.

During the course of the day 1,087 high explosive rockets, 5,300 40mm high explosive rounds, 28 napalm bombs and four 500-pound bombs were fired by support guns and aircraft. 143,500 minigun rounds were also fired by helicopter gunships. The guns of 104 Field Battery and A Field Battery fired hundreds of 105mm ammunition from two fire support bases at close to maximum range.

Major Taylor concentrated his company and planned to attack through the bunker system if the enemy started to withdraw. At about 3 p.m. pilots reported the enemy pulling out of the bunker system to the north. Taylor gave orders for the assault with two platoons up and told his platoon commanders not to expect heavy opposition as the enemy was reportedly fleeing.

At 3.40 p.m. the Company attacked and within ten minutes and having moved 50 metres into the bunker system, 11 Platoon was hit with heavy fire from the front and flanks. The enemy were well dug-in and had prepared wide fire lanes. They displayed excellent fire control concentrating fire on D Company's automatic weapons. The two leading machine gunners were killed and several individuals were wounded. The attack quickly stalled.

Private Casson, the last surviving rifleman in his section crawled forward into the fire lane to the casualties and checked that they were dead. He then retrieved a machine gun from under one of the bodies, gathered belts of linked

ammunition and crawled back. Casson was later mentioned in despatches for his bravery.

Second Lieutenant McKay also moved forward and retrieved the other machine gun. He then used it to engage the enemy who appeared to be attempting to outflank them and covered the withdrawal of the remainder of the section. The platoon withdrew leaving their dead comrades behind – the enemy fire was too intense to risk more lives in an attempt to extract bodies.

The company re-grouped and organised the evacuation of the wounded by dust-off helicopter. Meanwhile, enemy groups had left their bunkers and followed up behind the withdrawing troops, engaging the flanks whilst firing at the supporting helicopter gunships and control aircraft.

At 6.15 p.m., in fading light, Major Taylor ordered his company to break contact and began moving back 400 metres south to form a secure night harbour position. Almost immediately the enemy again began following up. Platoons went to ground and a fierce firefight followed in which several enemy were hit. It was soon apparent that the southern perimeter established by the company had also run up against another bunker system.

The company, now reduced to some 85 men was in a rough defensive circle approximately 35 metres across. They were unable to move because of the darkness and lacked basic protection such a shell-scrapes. They were running low on ammunition and were under fire from a strong and aggressive enemy force that had virtually surrounded them. The enemy continued directing fire into the company position until well after last light. D Company's flow of messages to the Battalion command post at Courtenay Hill conveyed the vulnerability of their position:

*1851 we are completely surrounded and we need more ammo
1858 I want every available support, the enemy are getting bad
1903 every time we move they fire. We are lying flat ... can't accept
Iroquois (helicopters), too dangerous.*

With daylight gone, a rescue using Armoured Personnel Carriers or an airmobile assault was out of the question and air support would be ineffective in darkness. The Commanding Officer realised that close artillery support was the only way to secure the embattled company; 'we ringed them with artillery for the next five hours' he said.

Crouching under enemy fire and unable to read his map properly in the darkness. Lieutenant Gregory Gilbert, D Company's forward observer, had to recall his grid references and mentally calculate distances and angles to

call in close artillery fire. Gilbert “walked” the fire in to within 100 metres of the perimeter.’

The enemy continued to fire RPGs and small arms and throw grenades into the position but on Taylor’s command the soldiers held their fire to conserve ammunition. Meanwhile the artillery rounds took effect and forced the enemy to pull back. As darkness descended the enemy fire grew erratic and finally ceased.

Shortly after 9 p.m. Second Lieutenant McKay was hit by a sniper; in pain and bleeding profusely, he hung on during the night, unable to be evacuated until morning. He was later awarded the Military Cross for his outstanding bravery and leadership throughout the action.

At first light the next morning D Company sent out clearing patrols and over the next two days the Battalion recovered the bodies of their dead and equipment left behind. In the 14-hour long engagement, Australian losses were five killed and 24 wounded including the commanders of 11 and 12 Platoons. Enemy losses amounted to nine killed and an unknown number wounded. The five soldiers who died were not only the battalion’s last deaths on the tour but the last Australian soldiers to die in combat in Vietnam.

38. **Official Records of the Action.** On 4 November 1971 4 RAR produced a substantial After-Action Report on Operation IVANHOE.⁹ Annex C to the report is the sequence of events taken from the Battalion Operations Log.¹⁰ It is consistent with the account in the Official History. Extracts relevant to the use of artillery with Delta Company on 21 September 1971 include:

1746 D Coy informed by CO that artillery and further airstrikes would be used. D Coy complete to move south at least 400m for safety.

1841 D Coy having moved 300m south came into heavy contact with enemy to SW (YS511852)

1846 FSB DEBBIE firing Danger Close for D Coy

1851 D Coy in all round defence, encircled by enemy, except to SE, who are attacking aggressively. Coy low on ammunition and need urgent resupply.

1858 D Coy requested all available support. Terrain and distance and darkness prevents APC assistance (No tanks). D Coy unable to mark position for air support, or accept ammunition resupply because of

⁹ Australian Army 4 RAR/NZ(ANZAC) Bn *After Action Report Operation IVANHOE*, R569-1/89 dated 1 November 1971, also contained in AWM95 1/4/247.

¹⁰ Commander’s Diary 4 RAR/NZ Duty Offr Log Annexes, AWM95 7/4/50 1-30 September 1971, also AAR.

heavy and sustained enemy ground fire. Artillery continuing on Danger Close procedure.

- 1903 *D Coy reported that enemy may have followed up from first bunker system. 11 Pl suspects there is another bunker system to the south because of apparent fire lanes.*
- 1948 *A24 (helicopter) in support of D Coy to provide Artillery Radio Relay.*
- 1951 *OC D Coy and FO cannot talk to each other in the present situation (any movement or talking draws aimed enemy fire) ...*
- 2105 *OC 11 Pl WIA. Will require dust-off at first light.*
- 2115 *D Coy continuing artillery fire, enemy activity quietening down, casualties Aust 5 KIA, 9 WIA.*

39. Appendix 3 to Annex D of the After-Action Report is Major Taylor's Summary of the Contact.¹¹ This detailed summary is consistent with the account in the official history. Extracts relevant to the use of artillery include:

19. Artillery fire was brought in to within 100m at all cardinal points. Any move, orders, or signals caused the enemy to fire into the perimeter ...

40. The 12 Field Regiment Commander's diary records the engagement on 21 September in their Operations Log.¹² Extracts relevant to the use of artillery with Delta Company include:

- 1718 *D Coy 4 RAR advised they had to pull back out of the bunker system to evac cas. Once fully out, the system will be hit with Arty and Air.*
- 1734 *D Coy Sitrep; 11 Pl, 12 Pl with Coy HQ went into bunker system. En eng with heavy volume of SA fire mainly directed at MGs. En have very good fire lanes and are well entrenched. Bunker system loc GR513857.*
- 1756 *BC 104 Bty will adjust FSB MAREE and DEBBIE onto bunker system. Opening grid 513861.*
- 1845 *D Coy 4RAR in heavy contact – DEBBIE eng 510850 – MAREE laid on. D Coy surrounded by enemy.*
- 2000 *DEBBIE and MAREE still active in area of D Coy ...*

¹¹ *After Action Report Operation IVANHOE, Appendix 3 to Annex D Summary of Contact.*

¹² *Commander's Diary 12th Field Regiment, Duty Offr Log Annexes, AWM95 3/8/7 1-30 September 1971.*

41. **Individual Recognition.** The 2019 Army report states that the following Australian honours and awards were approved for Delta Company individuals for the action:

Major Taylor	Military Cross	OC D Company
Second Lieutenant McKay	Military Cross	Command 11 Platoon
Corporal O'Sullivan	Military Medal	D Company Medic
Sergeant Jenkin	Mention in Despatches	PL SGT 11 Platoon
Private Casson	Mention in Despatches	Rifleman 11 Platoon

42. Corporal Melrose of Bravo Company was also awarded the Mention in Despatches (MID) and the United States Forward Air Controller, Lieutenant Rodriguez was awarded the US Navy Cross. Private Casson's MID was upgraded to the MG in 1999 following representation by Second Lieutenant McKay.¹³ The pilot of the 161 Reconnaissance Flight Helicopter, 2nd Lieutenant John Sonneveld, was awarded the Distinguished Flying Cross for his part in the action.¹⁴

Other Accounts of the Action

43. There are numerous other accounts of the action on 21 September 1971 including in books written respectively by Major Taylor – *Last Out*¹⁵ and Second Lieutenant McKay – *Delta Four - Australian Riflemen in Vietnam*.¹⁶ These accounts do not differ markedly from the Official History but contain recollections from both Taylor and McKay of Lieutenant Colonel Gilbert's actions during the battle and direct quotations from Gilbert himself which elaborate on what he did. Notably in *Last Out*, Major Taylor concludes:

... there is little doubt that had it not been for Major Towning's training and leadership of 104 Battery; Lieutenant Gilbert's¹⁷ cleverness in calculating his position without being able to consult a map and his subsequent corrections which kept the fire moving around the perimeter; and the splendid commitment of the artillerymen at the gun positions, D Company might well have come under a coordinated attack on the night of 21 September. One can only speculate what the outcome of that attack might have been ...¹⁸

¹³ Statement by Lieutenant Colonel McKay dated 2 February 2015, p. 3.

¹⁴ London Gazette, 1 September 1972, Page 10458.

¹⁵ J. Taylor, *Last Out 4 RAR/NZ (ANZAC) Battalion's Second Tour in Vietnam*, 2001, Allen & Unwin, Sydney. P.225.

¹⁶ G. McKay, *Delta Four - Australian Riflemen in Vietnam*, 1996, Allen & Unwin, Sydney. P.110.

¹⁷ Lieutenant Colonel Gilbert was a Temporary Captain at the time of this action.

¹⁸ *Last Out 4 RAR/NZ (ANZAC) Battalion's Second Tour in Vietnam*, P. 234.

Lieutenant Colonel Gilbert's Application for the Medal for Gallantry

44. On 2 June 2014 Lieutenant Colonel Gilbert wrote to the Directorate seeking recognition of his actions during the Battle of Núi Lé in September 1971. In November 2014 he was advised that he should submit an application in the correct format and he did that in a submission dated 15 February 2015. He said in his submission that his desired outcome was that 'his critical role in the Battle of Núi Lé (19-22 September 1971) be officially recognised by the awarding of the Medal for Gallantry'. He stated that he was 'prosecuting this application based on maladministration at the time of the operation and thereafter in South Vietnam'.

45. Lieutenant Colonel Gilbert said that 'the criticality of my role has been acknowledged by officers in the Infantry company with whom I fought but I never received so much as a "Well done!" from my Artillery superiors who were not present. I believe firmly that, by neglecting to make any award after the engagement, justice was neither done nor seen to be done'. He stated that he 'had no way of knowing whether any attempt was made through the artillery system to confer an award' and that his Battery Commander had expressed a view that whatever one did was what they were expected to do and should not be recognised by any award'.

46. Lieutenant Colonel Gilbert said that he believed that 'if the full details of my role in the battle were known at the time, and the quota system allowed it, I would have been awarded a Military Cross'.

47. In his submission, Lieutenant Colonel Gilbert included extracts from the 4 RAR After-Action Report to provide an overview of the progress of the battle and then provided an extensive account of his experiences. An edited summary of that account follows:

Lieutenant Colonel Gilbert's submissions

48. In his submission to the 2019 Tribunal, Lieutenant Colonel Gilbert included extracts from the 4 RAR After-Action Report to provide an overview of the progress of the battle and then provided an extensive account of his experiences. An edited summary of that account follows:

My parent artillery unit, 104 Field Battery RAA was placed in Direct Support of 4RAR/NZ(ANZAC) and I was allocated to D Company as the Forward Observer (FO). My FO Party comprised myself, a Bombardier FO Assistant, two Signallers and a Batman. I usually travelled with the Company Headquarters, keeping one Signaller and the Batman with me, and allocated the FO Assistant and a Signaller to one of the platoons (10, 11 or 12 Platoons), which one depending on their individual task.

On the morning of 21 September, D Company made contact with a bunker system in the vicinity of the Núi Lé feature. We suffered casualties, including one KIA from the shrapnel from a RPG which had been fired at a tree adjacent to the soldier, and found that we had hit a substantial bunker position. I recall hearing the distinctive sound of a North Vietnamese 12.7mm machine gun earlier in the day and wondering what we might be in for. We withdrew from the bunkers and called in "Dustoff" helicopters to remove the dead and wounded. At the same time I called in artillery fire support and air support from the US Army and US Air Force.

Later in the afternoon Major Jerry Taylor, Officer Commanding D Company, directed me to stop the artillery and air support and he called an Orders Group to attack the bunker system. He formed the company up with two platoons side by side at the front with the third platoon in reserve at the rear. Company Headquarters, where I was located, was between the attacking platoons and the reserve platoon.

On Major Taylor's command the platoons commenced moving forward. We had not progressed very far when the forward platoons entered the bunker system's firing lanes. Within a very short time we had suffered three KIA to machine gun fire and the whole attack propped. We were unable to progress the attack because of the intense machine gun fire so Major Taylor ordered us to withdraw.

We withdrew to the area of the winch point from where we had "dusted off" the dead and wounded earlier in the day, and re-grouped. We were then sent off in a southerly direction, away from the bunker system, in single file. It was my habit as an artillery observer always to count my steps and use my compass to keep track of direction. I worked on the basis that 120 of my steps was equivalent to 100 metres and, using the distance travelled and the direction, I would calculate my position under the jungle canopy by dead reckoning. This day was no exception. Although I was not able to accurately keep track of direction because, by then, night was starting to fall and it was growing very dim under the trees, I did try to count my paces.

We were moving quite quickly through the gathering gloom and our speed and anxiety was increased when messages were received from the rear platoon that the enemy had come out of the bunkers and were closely following us up.

We continued thus for a while but then there was a burst of gun fire from the front of our column. We found out later that we had walked into what we thought was the reserve bunker position of the main bunker position which we had attacked earlier and had been fired upon by the caretakers. We learned subsequently it was the 33rd Regiment's Headquarters. Of course we didn't know this at the time. All we knew was that there was intense fire in front of us and the enemy soldiers

from the bunker system were not far behind us. The effect was that we concertinaed into a tight group, with the rear elements converging on the leading elements which had halted.

The firing had meanwhile stopped and we formed into a reasonably tight circle. By then it was really quite gloomy so it was very difficult to see exactly where the perimeter of the circle was.

I positioned my forward observer party (signaller and batman) about five metres from Major Taylor who had put his party at the base of a large tree. I remember feeling relieved that the action seemed to be over and pulled out my map to plot our location and plan our defensive fire tasks for the night. Defensive fire tasks were possible targets communicated to the gun battery which would work out the calculations for firing in advance so that response time would be quicker in the event of an attack during the night.

However, no sooner had I sat on the ground and pulled my map from my pocket than the whole position came under heavy rifle and machine gun fire. We all prostrated ourselves as quickly as we could. I had my map in my hand but it was too dark to read it and the last thing I could have done would be to turn on my torch (probably quite literally the last thing).

I obviously had to call in artillery fire support as quickly as I could but I had a number of problems. The first and foremost problem was that I did not know where we were and the second was that I could not look at the map to determine it. However, by far my biggest concern was that when I called to Major Taylor to coordinate our actions I drew a volley of green tracer machine gun fire aimed at my voice. We were surrounded and the diameter of our circle was small enough to enable the NVA to hear my voice. I therefore realised that whatever I did, I had to take full responsibility and do it myself.

A further problem was the position of the guns. 104 Battery, which had six guns, had been split into two sections of three guns at two separate Fire Support Bases ("FSB"). The guns from one FSB, FSB Robin to the south west, were out of range and we were close to the maximum range of the guns at FSB Debbie to the west. These guns would be firing towards us and the dispersion of the rounds (statistical distribution of the fall of shot) would be large along the line of fire and the shrapnel would come towards us when the rounds exploded if they landed on the guns' side of our position. There was also the risk the rounds could land on us because of the dispersion pattern. It was therefore important to me that I positioned the fall of shot so that it didn't kill us all but was close enough so that I could adjust it as close as I could in the least amount of time. And time was of the essence, given the incoming rifle and machine gun fire we were receiving.

I had already realised that my map was useless and that if I were going to call in artillery fire I would have to work it out in my head. All the while I was lying on the ground, in fact, pressed as close to the ground as I could possibly get and was observing tracer bullets directed at me and passing about 30 cm above me. I assumed that the NVA knew that someone (me) would be trying to call in artillery fire.

I knew I had to determine my location as accurately as I could so that the target information I passed to the guns wouldn't be our own location and would not result in my shelling ourselves. As I said, I knew approximately how far I had walked and the vague direction. What I did was as follows. I reasoned that I could regard the path we had taken as the hypotenuse of a right angled triangle, though our path was not exactly straight. The other two sides of the triangle would be the distance I had moved in terms of Eastings (East-West) and Northings (North-South). From the hypotenuse I reckoned I could calculate the other two sides of the triangle using the theorem that the square of the hypotenuse was equal to the sum of the squares of the other two sides.

I knew we had walked further south than east so I made my assumption that the north/south side of the triangle would be long and the east/west side short. My starting point was where we had had the 'Dustoffs' during the day. I had been calling in air support so hoped I could sort of recall the grid reference of that location, but I was not positive I could recall it accurately. I then took my hypotenuse figure, the distance we had walked, and solved the triangle to obtain the other two sides. One side became the distance in Eastings we had walked and the other the distance in Northings. I then had to add my easterly estimate to the Eastings of the original grid reference to obtain the first half of my new location grid reference. Then keeping that half of the new grid reference in mind, I subtracted my southerly estimate from the Northings of the original grid reference to obtain the Northings figure for my new grid reference. I thus calculated, as best I could with tracer bullets flying over my head, and without being able to use a map or a piece of paper, our current location.

I had a signaller with me and the usual practice would have been for me to pass my commands to him and he would write them down and relay them to the guns over the radio. However, such practices were not appropriate here, given that my voice had already drawn aimed fire, and I didn't want the signaller having to remember everything I told him because he couldn't write it down, so I elected to pass the fire orders to the guns myself, striving to achieve a balance between being heard and understood by the gun position and not being heard by the NVA and drawing aimed gun fire at my voice. Using my newly-calculated current location I then worked out a new grid reference by simply changing the Eastings for the guns to be aimed at to allow a margin of error in case I had been wildly inaccurate in my calculations and had aimed the guns at myself. I then called in the fire.

Even then I wasn't confident that the rounds would not land on me. The gun position had told me that the time of flight of the rounds would be 22 seconds and I will confess that once the guns had reported "Shot" over the radio, meaning they had fired, the following 22 seconds was the longest in my life.

To my relief the rounds did not land on us and I then proceeded to adjust the fall of shot closer, a procedure known as Danger Close. Normally the rounds would be adjusted in along a compass bearing from the forward observer to the target. Because I had no way to obtain direction from me to where the rounds landed, I used the cardinal points of the compass and from that was able to obtain a rough idea of orientation from the sounds of the rounds landing. I brought the exploding rounds closer until live shrapnel from them was smashing through the trees above us and dead shrapnel was falling on us. When an artillery shell explodes the shell fragments are termed live shrapnel when they are powered by the force of the explosion. When they have expended this initial energy and are falling to earth under the influence of gravity they are termed dead shrapnel. This was as close as I could bring the fire without endangering our own troops. I then adjusted the fall of shot so that the shells moved around our perimeter. As the night progressed the machine gun fire ceased and I slowed the rate of fire, finally stopping it just after midnight.

49. Lieutenant Colonel Gilbert concluded his previous submission by stating that 'without my mental trigonometry the outcome of the Battle of Núi Lé may have been very different' and that he was of the view that what he managed to do that night 'was extraordinary, and I wonder today how I managed to do it'. He said that:

...the mental calculations at any time were difficult but whilst under fire and with bullets aimed at me passing inches over my head, they were extraordinarily difficult. And then to control the fire in the pitch dark, by hearing alone again while being shot at when I spoke was a clear demonstration of my striving to protect D Company despite the clear danger to myself.

50. He said that 'while my Battery Commander might not have thought I did anything extraordinary, others certainly did, which the attached statements and book excerpts make clear. I am sure no other forward observer in my Battery, nor the Regiment, could have done it. I believe that my calmness and coolness under fire, my application to my task despite the circumstances, putting my own self in danger by drawing aimed fire and my exceptional mental gymnastics in calculating a target for the guns was extraordinary and saved the lives of a large number of soldiers'.

51. Lieutenant Colonel Gilbert said that he believed that he had failed to be recognised 'through maladministration'. He said that what he did and what he achieved had a decisive effect on the outcome of the Battle of Núi Lé and, in normal circumstances at that time would have resulted in the award of an MC. He attached numerous supporting

statements from eye witnesses from the Battalion including Lieutenant Colonel Hughes, Major Taylor, Second Lieutenant McKay, Second Lieutenant Byrne and Captain Shannon who was the Signals Officer at the Battalion Headquarters and had provided the airborne radio relay to the gun line during the later stages of the battle.

Eye Witness Accounts of the Action and Their Recommendations

52. **Major Taylor.** Major Taylor (now deceased) made a statement in support of the application on 29 January 2015.¹⁹ He said that then Captain Gilbert was responsible for advising him on all technical and procedural artillery matters and with planning and implementing the application of fire. He was ‘confident that he was well across his job in both theory and practice’ and ‘he was always cool and calm under fire’. He said that they had:

formulated default procedures that he [Gilbert] should carry without reference to him if he became a casualty or was otherwise unavailable. This last paid particular dividends on the night of 21 September ...

53. Describing the situation as night fell on 21 September, Major Taylor said:

The situation was now very serious. The Company was down to 85 all ranks, ammunition was running low and we were surrounded ... the nearest other 4RAR Company was four kilometres away ... moreover there had been no time to establish the Company’s exact location or to organise coordinated defence ... There is no doubt in my mind that the enemy were preparing a ‘set-piece attack on our position. I am equally certain that had they done so, the Company would have been overrun. Our only chance was to get artillery fire down around our position. However, Captain Gilbert and I were separated by several metres and each time we tried to communicate we drew heavy fire. This situation was exactly why we had prearranged our ‘default’ procedures and I knew that I could rely on him to bring fire in as quickly as possible without my prompting.

.... To this day I remain in awe as to how Captain Gilbert was clever and self-possessed enough to calculate his exact position on the ground, in the dark, without reference to a map and under continuous heavy fire. Nevertheless he did fix his position, brought fire down and over the next four hours made corrections which moved the fire around and very close to our perimeter, killing the enemy commander and causing the enemy to withdraw.

¹⁹ Statement by Lieutenant Colonel J.H. Taylor, AM, MC, (Retd) in *Relation to Captain Gilbert* dated 29 January 2015.

54. Major Taylor did not make a recommendation in his statement regarding what recognition should now be bestowed but said that ‘by some oversight, then Captain Gilbert’s name was not put forward for recognition by 12th Field Regiment’. He concluded his statement by saying:

I consider this to be a glaring omission, and so do all the members of D Company 4 RAR because we owe him our lives.

55. **Lieutenant Colonel Hughes.** Lieutenant Colonel Hughes (now deceased) made a statement in support of the application on 3 February 2015.²⁰ His statement was focussed on the processing of awards within the Battalion group. He said that he had discussed recognition of ‘two men’ with the Commanding Officer of the 12th Field Regiment and was ‘disappointed that the members of 12 Field Regiment who supported 4RAR/NZ so well failed to get a mention when the awards were published’. He said that they ‘had to reduce their awards because of the medal ration imposed’ and ‘I rightly or wrongly assumed that the same situation had applied to 12 Field Regiment’.

56. In relation to the action he stated that ‘Captain Gilbert by his actions prevented many Australian casualties’. He said that:

...at dusk 948 enemy surrounded our 85 strong D Company. Captain Gilbert saved D Company and forced the enemy to withdraw during the night to their base in the next Province. His actions certainly deserve recognition.

57. **Second Lieutenant McKay.** Second Lieutenant McKay made a statement in support of the application on 2 February 2015.²¹ His statement describes his involvement in the action and is consistent with the account in the official History. He said that during the day then Captain Gilbert ‘coordinated the delivery of indirect and direct fire’ and that ‘at times this became extremely difficult owing to communications difficulties’. He described his platoon’s first contact and the role Gilbert played in coordinating covering fire from the Artillery Battery as he organised a fighting withdrawal.

58. Second Lieutenant McKay also described the early stages of the evening when his Platoon had re-joined the Company and they were surrounded. He said that the Company ‘was in a circular all-round defensive posture about 75 metres across and enemy fire was being directed at them from three sides’. He said that ‘at this stage I was severely wounded’ and was dragged back to Company Headquarters where he was able to listen to then Captain Gilbert coordinating the fire support. He stated that:

²⁰ Statement by Major General J.C. Hughes, AO, DSO, MC (Retd) in *Relation to Captain Gilbert* dated 5 February 2015.

²¹ Statement by Lieutenant Colonel G.J. McKay, MC (Retd) dated 2 February 2015.

He was bringing the fire support in to danger close and it was evident that his coordination of this support prevented the enemy from coordinating an assault against D Company.

... In my opinion the well-coordinated use of the field artillery by Captain Gilbert in extremely demanding circumstances ensured the survival of D Company.

59. Second Lieutenant McKay said that he ‘found it somewhat incongruous that Captain Gilbert was not recognised in some way after the action.’ He concluded with the recommendation that:

I believe an MG is the least that should be awarded to Captain Gilbert for his actions on 21 September 1971.

60. **Second Lieutenant Byrne.** Second Lieutenant Byrne commanded 10 Platoon during the battle and was the acting Company Second in Command during the afternoon and evening of the Battle. He also made a statement in support of the application.²² He said:

... crucial to both the attack phase and the withdrawal was the fire support from the artillery assets. This fact alone guaranteed the survival of the company. Greg Gilbert’s professionalism and coolness under the conditions of battle was quite extraordinary. The accuracy of the firepower was impressive enough, but the timeliness of the delivery and the frequency of the danger close missions that Greg coordinated and delivered that afternoon was crucial ...

... Greg’s coolness in moving danger close missions around the same perimeter contributed to our overall safety through the long and arduous night. Greg was unable to talk to his Company Commander who was positioned some 5 metres away as any attempt to call out drew immediate fire from the enemy on the perimeter. Greg responded intuitively to the task ...

... once the close quarter shooting had started Greg was unable to use the map but somehow worked the calculations in his head ... he had counted his paces from the winch point and applying a set of mental calculations arrived at our ‘location’. He then adjusted fire according to the cardinal points using only his compass and the initial rounds were dispatched at a safe distance ...

... I was in Coy HQ at the time ... I witnessed personally the coolness and professionalism that he displayed in executing the various fire plans that ultimately turned the battle in our favour throughout the night ...

²² Statement by Second Lieutenant K.M. Byrne.

Second Lieutenant Byrne concluded his statement with the recommendation that then Captain Gilbert ‘deserves official recognition’.

61. **Captain Shannon.** Captain Greg Shannon was the Regimental Signals Officer. Although not directly involved in the actual fighting, he was in the Battalion Headquarters and later was in a helicopter used to establish a radio retransmission facility to enable Captain Gilbert to speak with the artillery gun line during the action. He provided a supporting statement in April 2018.²³ He said:

... in the Command Post we were working furiously to keep up with the clearances being sought to fire the guns. A further, but little-known dimension, that complicated the situation was two-fold. First, the guns were at extreme range ... and second, the guns were firing ‘head-on’ into D Company’s position and not from the more desirable flank ... that there were no own troop casualties from this potentially dangerous situation exemplifies the skill exuded by Greg Gilbert ...

... I was able to monitor the conversations. Greg Gilbert’s calmness and stoicism under the relenting enemy fire was amazing to say the least ...

Not one artilleryman, at the time, received recognition. Of Captain Gilbert it was said, ‘he was just doing his job!’. Nothing could be further from the truth. His skills, composure and tenacity during an extraordinary day ... were well worthy of formal recognition.

62. At the time Captain Shannon provided his supporting statement, he was aware that Lieutenant Colonel Gilbert had been retrospectively awarded the DSM. He concluded his statement by saying:

... Combined with his leadership, he was ‘brave’. In context he was no less brave nor courageous than were Major Taylor and Second Lieutenant McKay each of whom was awarded the MC. Greg Gilbert should be awarded no less than today’s equivalent of the MC or, as would be more appropriate, the MG.

63. **Second Lieutenant Spinkston.** Lieutenant Colonel Gilbert provided an extract from ‘a story told to Bob Meehan by Graham Spinkston’ in his comments on the Army Report.²⁴ He said that the Spinkston, the platoon commander of 12 Platoon, had been ‘wounded during the earlier part of the battle and was evacuated by helicopter. He was not present during the night of 21 September’. In relation to Lieutenant Colonel Gilbert’s actions, Spinkston said in his ‘story’:

²³ Statement by Lieutenant Colonel G. Shannon, OAM (Retd) dated April 2018.

²⁴ Letter from Lieutenant Colonel Gilbert to the Tribunal dated 11 January 2019, Annex A.

...it was due to the Artillery fire, directed by our Forward Artillery Observer Lieutenant Greg Gilbert that this [enemy attack] didn't eventuate.

The Award of the DSM

64. On 10 November 2017 Lieutenant Colonel Gilbert was advised that he had been awarded a DSM which was gazetted in the Commonwealth of Australia Gazette on 6 February 2018.²⁵ The award was:

For distinguished leadership in warlike operations as Forward Observer, 12th Field Regiment attached to Delta Company, 4th Battalion, the Royal Australian Regiment, in Vietnam on 21 September 1971

65. The citation for the award stated:

During operations conducted in the north of Phuoc Tuy province, South Vietnam, Captain Gilbert skilfully directed artillery fire enabling Delta Company to successful (Sic) extricate itself from a strongly defended enemy bunker system. During the withdrawal the Company was continually attacked by a motivated and aggressive enemy who were unable to gain any advantage due to accurate artillery fire brought down by Captain Gilbert. For almost fourteen hours Captain Gilbert brought accurate and concentrated fire on the enemy, enabling the Company to withdraw to and hold a secure position until relieved.

Lieutenant Colonel Gilbert's Appeal for the DSM to be replaced by the MG

66. In his earlier application for review, Lieutenant Colonel Gilbert stated that:

... although honoured to be recognised, I was confused as to why I received it and not a Medal for Gallantry which, I believe, would more accurately have recognised my contribution

67. Lieutenant Colonel Gilbert said that he was lodging an appeal against the award of a DSM as he believed it was inappropriate for the circumstances described in his submission and that 'the award of the Medal for Gallantry is the appropriate award'.

68. He said that the DSM is awarded for distinguished leadership in 'warlike operations' and there was no requirement that those operations involved 'in action, combat, or actual engagement with the enemy'. He stated that there was nothing in the criteria for the DSM which specified or implied that the recipient should have been involved 'in action or actual contact with the enemy'. He opined that it did not appear that any recent contemporary recipients of the DSM for operations in Iraq or Afghanistan

²⁵ Commonwealth of Australia Gazette dated 6 February 2018.

had been ‘in action’ and it seemed that all of these recent awards were for leadership in ‘warlike operations’ and none involved action.

69. Lieutenant Colonel Gilbert noted that, by contrast, the MG was awarded for acts of gallantry in action in hazardous circumstances. He stated that ‘in action in a military context is the engagement between opposing forces. A member must be physically in a situation involving direct conflict between opposing forces to be determined to be in action’. He said that hazardous circumstances ‘invariably involve being in action’.

70. He stated that his actions directing artillery fire to ‘about 30 metres from our position’ and coordinating aerial fire when surrounded by enemy under a jungle canopy, illuminated only by green tracer in pitch darkness over a period of six hours, ‘argued, to my mind, of gallantry in hazardous circumstances, not leadership in warlike operations’. He said that there could be ‘no argument that he was not in action, physically in a situation involving direct conflict between opposing forces’.

71. Lieutenant Colonel Gilbert, whilst acknowledging that every situation is unique and that ‘one should not use comparisons’, stated that a review of similar actions would be worthwhile in his appeal. He said that he was aware of only two examples of an artillery Forward Observer receiving an award for observer duties ‘in action’ in Vietnam. Firstly, Captain Morrie Stanley was awarded the MBE at the Battle of Long Tan where the outcome was ‘attributed by all, not least by the company commander, to the artillery’. Secondly, Lance Bombardier Maher, who was the Forward Observer Assistant attached to B Company 3 RAR in June 1971 and took over the direction of fire after the Forward Observer was killed. Maher ‘directed battery fire for nine hours, sometimes to within 100 metres of the Australian infantry’ and was awarded the Military Medal. Lieutenant Colonel Gilbert said that both of these men performed gallantly ‘in action’ under hazardous circumstances. He stated that they would not have been described as having provided ‘leadership in warlike operations’. The Tribunal noted however that the conditions for the award of the MBE at the time was:

*for distinguished service, in peace or war, not necessarily under fire ...*²⁶

72. Lieutenant Colonel Gilbert also provided further comparisons including another Forward Observer, Lieutenant Clark, who received a MC in 1967 for an action which Lieutenant Colonel Gilbert considered to be ‘not dissimilar to the circumstances in which I found myself ...’.²⁷ He also highlighted the 1998 retrospective award of the DSM to Captain MacKenzie from 4 RAR for his role in the Battalion in 1971. He said that the DSM was appropriate as it recognised MacKenzie for ‘administrative and planning

²⁶ Pamphlet on Military Honours and Awards 1960 WO Code 12922 – War Office (MS3) July 1960.

²⁷ Letter from Lieutenant Colonel Gilbert to the Tribunal dated 11 January 2019, P.7.

duties’. He said that by comparison, he was ‘in action, under hazardous circumstances, in direct contact with the enemy’.

73. Lieutenant Colonel Gilbert reiterated that ‘the artillery was indubitably what saved D Company during the night of 21 September 1971. Without close and accurate artillery fire the Company may well have been over-run. It was arguably my skill and calmness under fire which enabled that crucial and decisive artillery fire’. He concluded his review request with the following statement:

I believe that what I did and what I achieved decided the outcome of the Battle of Núi L  and saved the lives of many Australian soldiers. My actions under fire from the enemy are appropriately described as gallantry in action under hazardous circumstances, not leadership in warlike operations. I therefore request that my appeal be received favourably and that I be awarded the Medal for Gallantry in lieu of the Distinguished Service Medal.

The Army Report and reasons for decision to recommend the DSM

74. **The Army Report.** The Army Report on Lieutenant Colonel Gilbert’s service was prepared in April 2017 in response to Lieutenant Colonel Gilbert’s 2015 application for the MG.²⁸ The report aimed to ‘determine whether Mr Gilbert’s failure to be recognised for his actions was due to maladministration’. This was later clarified with Lieutenant Colonel Gilbert to be not a case of maladministration but rather his ‘actions going unrecognised at the time’.²⁹ Lieutenant Colonel Gilbert disputed this in his comments on the Army Report and also asserted that ‘miscrediting’ Major Taylor and not himself ‘may have satisfied a definition of maladministration’.³⁰

75. The Army Report identified that the policy for honours and awards at the time was based on *Military Honours and Awards 1953* with wider guidance contained in the *Pamphlet on Military Honours and Awards 1960*.³¹ The Report also addressed the Operational Scale of Awards (Quota) for the period 1 July – 31 December 1971 and noted that the quota was fully subscribed with 20 decorations and 31 MIDs. The Report discussed the potential confusion regarding who would recommend an award for an attachment to a unit as was the case for Lieutenant Colonel Gilbert who was a Forward Observer. It was concluded that either the Commanding Officer of the 12th Field Regiment (Gilbert’s parent unit) or the Commanding Officer of 4 RAR (the supported unit) could have initiated a recommendation at the time had they been aware of the action

²⁸ Report Into Category 3 Public Submission to the Inquiry into Unresolved Recognition for Past Acts of Naval and Military Gallantry – Captain Gregory Vivian Gilbert, R28416994 dated April 2017.

²⁹ Ibid. P.13.

³⁰ Letter from Lieutenant Colonel Gilbert to the Tribunal dated 11 January 2019, p.5 and p.6.

³¹ *Pamphlet on Military Honours and Awards 1960*, WO 12922.

and determined that recognition was appropriate. There is no evidence that either officer raised a recommendation at the time.

76. The Army Report included an analysis of the procedures used for Danger Close artillery coordination, highlighting the traditional method and importantly, the developing procedure ‘borne out of experience’ which was utilised by Lieutenant Colonel Gilbert at the time. This later method was stated to be quicker and more suitable to close country. Notably, the Report indicated that:

... Gilbert’s use of the abbreviated fire control procedure was such a success that it was recommended for inclusion in the 1 ATF SOPs.³²

77. The Report further identified that:

The use of artillery during the Battle of Núi Lé was critical in the defeat of the NVA forces and the prevention of significant casualties among Australian forces.³³

78. Relying on the citation for Major Taylor’s Military Cross, the author of the Report concluded that:

The credit for the employment of the artillery has been given to Major Taylor.

79. The author emphasised two lines from the citation which stated that ‘Major Taylor worked tirelessly without rest, to coordinate air and artillery support’ and ‘Major Taylor retaliated with close artillery missions causing the enemy to withdraw’.

80. Lieutenant Colonel Gilbert in his comments said that this was not what happened and that:

Calling for fire was totally at my own initiative. I didn’t wait to be told. I knew I had to call in fire for our survival.³⁴

81. The Army Report stated that:

the use of indirect fires in support of D Coy during the battle at Núi Lé is widely accepted as critical to minimising the number of Australian casualties. The role of artillery during the fighting, including the use of Danger Close procedures, was well known and recognised at the time. Should they have felt necessary or

³² Report Into Category 3 Public Submission to the Inquiry into Unresolved Recognition for Past Acts of Naval and Military Gallantry – Captain Gregory Vivian Gilbert, R28416994 dated April 2017 – P.49-50.

³³ Ibid. P.81.

³⁴ Letter from Lieutenant Colonel Gilbert to the Tribunal dated 11 January 2019, P.5.

*appropriate, there was ample opportunity for senior officers involved in the fighting to nominate Captain Gilbert for his actions.*³⁵

82. The Army Report concluded with the recommendation that Lieutenant Colonel Gilbert's failure to be recognised did not constitute maladministration.³⁶

83. The Report stated that this information was subsequently provided to the CA who, after considering all of the material, decided to recommend to the Minister that Lieutenant Colonel Gilbert be awarded the DSM as:

*a recommendation for distinguished service was the most appropriate category of recognition based on Lieutenant Colonel Gilbert's coordination of offensive support capabilities in complex and technically challenging circumstances*³⁷

84. The Minister agreed with the recommendation on 25 October 2017.

Lieutenant Colonel Gilbert's evidence at the 2019 hearing

85. During the 2019 hearing Lieutenant Colonel Gilbert gave oral evidence and elaborated on the material he had provided in his application. At the outset, Defence confirmed that Lieutenant Colonel Gilbert's actions at Núi Lé were not disputed.³⁸ The focus of the hearing was therefore very much on the view to be taken of his actions.

86. Lieutenant Colonel Gilbert continued to press his view that his actions were gallant as he remained 'cool, calm and collected' whilst adjusting and calling for fire in extremely dangerous circumstances.³⁹ He said that he had been required to adjust fire using single rounds and one gun until he was confident that he could 'fire for effect'. He said that he adjusted fire and subsequently moved the fire around in 50 metre increments relying on the explosions of the rounds as they landed as a reference point. He said that he was grateful that this was not his first time under fire as he had experienced bringing fire in to danger close range in a contact in July, albeit by day.

87. Lieutenant Colonel Gilbert reiterated to the Tribunal and Defence that he was not on 'warlike operations' but was 'in action'. He said that he considered that his actions 'were worthy of recognition' and it would have been difficult for someone else to adjust the fire as effectively as he had done. He acknowledged that although he had claimed

³⁵ Report Into Category 3 Public Submission to the Inquiry into Unresolved Recognition for Past Acts of Naval and Military Gallantry – Captain Gregory Vivian Gilbert, R28416994 dated April 2017 – P.87.

³⁶ Army Decision Brief R34926763 dated 3 July 2018.

³⁷ Letter from CA to the Tribunal OCA/OUT/2018/R35335920 dated 5 December 2018.

³⁸ Oral Submission to the Tribunal by Brigadier M.Holmes at the public hearing on 14 February 2019 in Canberra.

³⁹ Oral Evidence to the Tribunal by Lieutenant Colonel Gilbert at the public hearing on 14 February 2019 in Canberra.

that he should be awarded the MG, he also understood that the Tribunal may recommend a lower level of gallantry award and that he would ‘understand if that were to be the case’.

88. In relation to the assertion that he was in a leadership position, Lieutenant Colonel Gilbert acknowledged that Major Taylor, himself and the platoon commanders would ‘get together each night and plan for the following day’. He agreed that he was ‘an adjunct to the leadership group’ and that in the succession of command, it was established that he would take command should the Company Commander become a casualty in action.

89. Lieutenant Colonel Gilbert reiterated the material in his application regarding comparable actions and added the comparison of a contemporary Forward Observer who had received a MG in Afghanistan. Colonel Thomas confirmed that a Joint Fires Observer, Bombardier David Robertson, had received the MG for acts of gallantry in action on 20 March 2011.⁴⁰ The citation in the 2012 Queen’s Birthday list confirms that Bombardier Robertson coordinated indirect support whilst under fire and prevented casualties among Australian and Afghan forces.⁴¹ Lieutenant Colonel Gilbert asserted that, if the CA had reviewed contemporary actions and recognition, then he should have arrived at a gallantry award for his actions using the Robertson example as a template.

90. Lieutenant Colonel Gilbert concluded his evidence by again asserting that at the time he should have been ‘recognised for his bravery like many of the infantry’ and that ‘when I saw the honours for the infantry, I wondered why I didn’t get anything’.

Major General Ford (Retd) - Evidence at hearing (subject matter expert)

91. Prior to the hearing, the 2019 Tribunal identified the need for a subject matter expert in the field of employment of artillery during the Vietnam War. Major General Tim Ford, a former Artillery Officer was identified and invited to attend the hearing due to his significant military qualifications and expertise in this area.

92. Major General Ford gave expert evidence to the Tribunal by conference telephone. There was no dispute by the Applicant or Defence as to Major General Ford’s subject matter expertise in relation to the employment of artillery in support of operations in the Vietnam War. He was accepted as being a suitably qualified expert by the Tribunal.

93. Major General Ford firstly summarised the respective roles of officers in the Battery, including the Forward Observer and Battery Commander. He then turned to Lieutenant Colonel Gilbert’s role and conduct on 21 September 1971, noting there was no dispute as to his actions.

⁴⁰ Oral Evidence by Colonel Thomas at the public hearing on 14 February 2019.

⁴¹ Queen’s Birthday Honours List 2012, Australian Army, Bombardier D.S. Robertson – *MG For acts of gallantry in action in hazardous circumstances on 20 March 2011 while a joint fires observer in Mentoring Force – Two on Operation SLIPPER in Afghanistan.*

94. In his expert opinion Major General Ford said that Major Taylor's attribution of responsibility for the outcome of the Battle to the Battery's leadership and training, the commitment of the gun line and Lieutenant Colonel Gilbert's skill was a reasonable summation. Further, it was his opinion, that Lieutenant Colonel Gilbert was in a leadership position and was an integral part of the company command and leadership group. He said that it was an accepted practice that the Forward Observer would take command if the commander became a casualty, thus reinforcing the view that the Forward Observer was in the company leadership group.

95. Major General Ford agreed that Lieutenant Colonel Gilbert was doing his job and what was expected of him at the time, but he was doing this job 'under extreme circumstances' and the way that he worked out his position was 'very sensible'. In his view, Lieutenant Colonel Gilbert should have been nominated for a bravery award at the time and, if he had been, he may well have received the MC or a MID.

Defence's submissions at the 2019 hearing

96. **The Reason for Recommending the DSM.** Defence said that the CA, in reviewing the application submitted by Lieutenant Colonel Gilbert, had determined that his actions at the time were not appropriately recognised and sought to rectify those circumstances with what he considered was an appropriate contemporary award. Defence said that a 'desktop review' of the application concluded that there was no authoritative evidence found that a recommendation for an award had been made at the time of the Battle. Defence stated that the fact that no award was conferred at the time did not point to a failure in due process.

97. Defence said that the desktop review did identify that the employment of artillery during the Battle at Núi Lé was critical to the outcomes of that action and that 'the procedures used to call in a "danger close" fire mission to within 25-30 metres of the Australian positions became adopted practice within the 1st Australian Task Force — Vietnam, Standard Operating Procedures'.

98. Defence noted that due to 12 Field Regiment's departure from Vietnam less than three weeks after the Battle, the opportunity to accurately attribute and discuss the actions of then Captain Gilbert in order to advance a recommendation for an appropriate honour 'could have been' the reason for no nomination being submitted.

99. Defence said that, upon receiving the Army Report, the CA conducted his own assessment and considered that the actions of Lieutenant Colonel Gilbert during the Battle warranted recognition. Defence said that 'General Campbell was partially focused on 12th Field Regiment's departure from Vietnam shortly after the Battle of Núi Lé'. Defence said that 'in seeking to address the lack of appropriate recognition at the time the CA

recommended that a DSM be awarded to Lieutenant Colonel Gilbert, under the current awards system’.

100. Defence said that, in reaching this decision, the CA assessed the information in the desktop review and recognised that, ‘on the balance of probability’, Lieutenant Colonel Gilbert’s actions ‘would have been considered for an award at the time’ however there was no evidence that the Commander submitted a nomination. Defence said that the CA was cognisant that, under the contemporary Australian Awards System, the awards conferred at the time on those serving in Vietnam were no longer available. He said that the CA therefore ‘reviewed the contemporary Regulations for Gallantry and Distinguished Service awards and met with the then Director General Personnel-Army, Director Personnel Policy — Army and the Staff Officer Grade One Personnel Policy, to discuss his assessment and seek further advice in respect of the application of Gallantry and Distinguished Service awards’.

101. Defence said that the CA ‘compared the actions of Captain Gilbert to those actions of the individuals submitted in support of Lieutenant Colonel Gilbert's submission and also applied the lens of contemporary operations by considering Captain Gilbert’s actions to those of current Afghanistan operational awards’. Defence said that the CA ‘placed weight on the technical mastery and leadership shown in the decisions made by Captain Gilbert and his skill to call in “danger close” artillery support; and determined that the appropriate award was that of the DSM’.

102. Defence acknowledged Lieutenant Colonel Gilbert’s view that he was ‘in action’ and not on ‘warlike operations’, however the Army position was that ‘warlike operations encompassed in action’. Defence did not address whether Lieutenant Colonel Gilbert’s claim for the MG was considered, indicating that the CA view was that the appropriate award was the DSM.

103. In response to questions at the hearing regarding the application of the eligibility criteria (as amended) for the DSM, Defence acknowledged that the award is ‘only for distinguished leadership in warlike operations’. Defence stated that Army considered that Lieutenant Colonel Gilbert was in a leadership position as he was an officer and was required to apply leadership qualities in the performance of his duties over a sustained period of time.

104. Defence concluded his submission at the hearing by stating that ‘it is Defence's position that the decision of the CA redressed the absence of a nomination and recognised appropriately the actions of Lieutenant Colonel Gilbert’.

Final Submissions by the Applicant at 2019 hearing

105. On the question of leadership, Lieutenant Colonel Gilbert stated he did not agree with Defence's view that as an officer, he was therefore in a position of leadership. He stated Defence was 'defining leadership in a bubble' and that it was unreasonable to conclude he was in a leadership position as he 'had no followers', other than those in his small Forward Observer party. He did not however, challenge the expert evidence given by Major General Ford on the topic of his leadership or make any submissions thereon.

2019 Tribunal Consideration

106. **The Action.** The 2019 Tribunal noted that the description of the action at Núi Lé as recorded in the Official History and Lieutenant Colonel Gilbert's account of his involvement and actions was not in dispute, as confirmed by Defence during the hearing.⁴²

107. Whilst the details of the action are agreed, the 2019 Tribunal was of the view that the various accounts seriously understated the perilous circumstances in which the Delta Company group found itself. In particular the Tribunal noted the close proximity of the Company – 85 soldiers all within an area of approximately 35-75 metres, in thick jungle, under a dense canopy with zero visibility and surrounded by a numerically superior enemy force of regular soldiers. The situation was, in the opinion of the Tribunal, dire. The Tribunal also noted that the Company had been in close combat for much of the day, had taken casualties, and had had a number of their own killed in action and their bodies left behind. The Tribunal was of the view that individuals in the Company would have been under significant stress and pressure by nightfall and faced the possibility of annihilation.

108. **Was Captain Gilbert Nominated for Recognition by the Chain of Command?** The 2019 Tribunal noted that the Army Report was focussed on the nomination policies in place at the time of the action and concluded that the failure to be nominated does not constitute maladministration. The Tribunal noted that Lieutenant Colonel Gilbert also asserts that his failure to be recognised was due to maladministration.

109. The 2019 Tribunal found no direct evidence of the reason for his failure to be nominated, although it appears that the Battalion Commander did discuss recognition with the Artillery Commander but this did not result in a recommendation. During the hearing, it was agreed by Defence that there was no evidence that Captain Gilbert had been recommended for recognition at the time of the action or in the aftermath of the deployment in 1971.

⁴² Oral Submission to the Tribunal by Brigadier M.Holmes at the public hearing on 14 February 2019 in Canberra.

110. The 2019 Tribunal noted that Defence had formed a view that 12th Field Regiment's departure from Vietnam less than three weeks after the Battle, 'could have been' the reason for no nomination being submitted and that 'General Campbell was partially focused on 12th Field Regiment's departure from Vietnam shortly after the Battle of Núi L  '.

111. The 2019 Tribunal did not consider that maladministration is relevant and, relying on statements by Lieutenant Colonel Hughes and Major Taylor, was reasonably satisfied that Captain Gilbert was not nominated for recognition at the time of the action or immediately following the deployment in 1971. The Tribunal acknowledged Defence's speculation that the departure of the Regiment from Vietnam three weeks after the Battle may have resulted in an oversight and could have been the reason for non- recognition.

112. **The Operational Scale and Comparisons.** The 2019 Tribunal noted that Lieutenant Colonel Gilbert asserted that, had the quota system allowed it, he would have been nominated for the MC. The Tribunal found no evidence to support this assertion and, in any case, the Tribunal in its merits review was not constrained by a quota. The Tribunal noted that Lieutenant Colonel Gilbert identified other comparable actions which resulted in recognition of Forward Observers and made specific mention of a contemporary award of the MG to Bombardier Robertson in 2012.⁴³ The Tribunal in that review did not accept that comparisons were a valid method of establishing a 'benchmark' for a particular award and that, in any case, each situation is unique – involving different circumstances and occurring when exposed to different levels of threat and complexity. Accordingly, the Tribunal rejected Lieutenant Colonel Gilbert's claims regarding comparisons as the Tribunal is required to determine matters based on individual eligibility as determined by the conditions for the award or decoration as declared in the Instruments, Regulations and Determinations for each particular honour, stating that 'eligibility is determined in each matter according to its own facts'.

113. For similar reasons the 2019 Tribunal rejected the assertion in Lieutenant Colonel Gilbert's closing submission which implied that he should have been 'recognised for his bravery like many of the infantry'.

114. **Merits Review by Defence.** The 2019 Tribunal noted that the decision to recommend Lieutenant Colonel Gilbert for the DSM by the CA was made to 'redress the absence of a nomination'. In making this decision it appeared that no merits review of Lieutenant Colonel Gilbert's actions was conducted and his contention that he should receive the MG was not considered in any detail. The Tribunal however acknowledged that there was 'no legislative requirement for such a review by Defence'.

⁴³ Oral Evidence to the Tribunal by Lieutenant Colonel Gilbert at the public hearing on 14 February 2019 in Canberra and contents of an email from Lieutenant Colonel Gilbert to the Tribunal dated 4 March 2019.

115. The 2019 Tribunal considered that whether failure to nominate could be considered to amount to maladministration or not was largely immaterial as the Tribunal is bound by legislation to conduct a merits review of Lieutenant Colonel Gilbert's actions. Noting that the Applicant sought to be 'awarded the Medal for Gallantry in lieu of the Distinguished Service Medal', the Tribunal decided that it would first assess the merits of Lieutenant Colonel Gilbert's actions against the eligibility criteria for gallantry decorations before turning to an assessment of the appropriateness of the award of the DSM.

Evidence and Findings from the Accounts of the Action

116. **Summary of Lieutenant Colonel Gilbert's Actions.** The 2019 Tribunal noted that there are numerous accounts of the Battle in various publications and from witnesses as described in the application and summarised earlier in this report. The actions of Lieutenant Colonel Gilbert were not in dispute however, where there were inconsistencies, the Tribunal preferred the eye witness account provided by Major Taylor, supported by the oral and written evidence of Lieutenant Colonel Gilbert, as the basis from which to assess the action. Major Taylor's edited account stated:

The situation was now very serious. The Company was down to 85 all ranks, ammunition was running low and we were surrounded ... the nearest other 4RAR Company was four kilometres away ... moreover there had been no time to establish the Company's exact location or to organise coordinated defence ... There is no doubt in my mind that the enemy were preparing a 'set-piece attack on our position. I am equally certain that had they done so, the Company would have been overrun. Our only chance was to get artillery fire down around our position. However, Captain Gilbert and I were separated by several metres and each time we tried to communicate we drew heavy fire. This situation was exactly why we had prearranged our 'default' procedures and I knew that I could rely on him to bring fire in as quickly as possible without my prompting.

.... To this day I remain in awe as to how Captain Gilbert was clever and self-possessed enough to calculate his exact position on the ground, in the dark, without reference to a map and under continuous heavy fire. Nevertheless he did fix his position, brought fire down and for the next four hours made corrections which moved the fire around and very close to our perimeter, killing the enemy commander and causing the enemy to withdraw.

117. **Findings of Fact in Relation to Lieutenant Colonel Gilbert's Actions.** Having reviewed the evidence, the 2019 Tribunal was reasonably satisfied that the following facts were established relating to Lieutenant Colonel Gilbert's actions:

- a. Lieutenant Colonel Gilbert was attached to Delta Company, 4 RAR as their Forward Observer from June to November 1971 and was trained to perform that role.
- b. The Company had been in close combat with the enemy for most of the day on 21 September 1971 and had suffered serious casualties and a number killed in action.
- c. By nightfall the Company was consolidated in all-round defence in an area approximately 35-75 metres across, in thick jungle under a dense canopy with zero visibility.
- d. The Company was unable to move because of the darkness and lacked basic protection, such as shell-scrapes.
- e. The Company was running low on ammunition and was continually under fire from a strong and aggressive enemy force that had virtually surrounded them.
- f. Lieutenant Colonel Gilbert had to recall his grid references and mentally calculate distances and angles to call in close artillery fire. He was unable to use light or his map due to enemy fire.
- g. He adjusted the fire to within 30-100 metres of the perimeter at all cardinal points using the sounds of the rounds exploding to move the fire.
- h. The Company and Lieutenant Colonel Gilbert remained under small arms, machine gun and grenade fire from last light on 21 September until approximately 2115 hours.

Lieutenant Colonel Gilbert's Eligibility for a Gallantry Award

118. The 2019 Tribunal noted that to be eligible for an Australian gallantry award, Lieutenant Colonel Gilbert's actions would need to demonstrate that he had performed 'acts of gallantry in action'.⁴⁴ 'In action' is usually a relatively straight forward concept involving armed conflict in close proximity to or under the fire of an adversary. In this matter, the Tribunal was reasonably satisfied that Lieutenant Colonel Gilbert, for the purposes of the Gallantry Regulations, was 'in action'.

⁴⁴ *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991,

119. The 2019 Tribunal stated that whether Lieutenant Colonel Gilbert's actions could be considered to be 'gallant' was less straightforward. The Tribunal noted that two eye witnesses, many years after the action, concluded that his actions were 'worthy of recognition' (Lieutenant Colonel Hughes and Second Lieutenant Byrne). Two other witnesses claimed that his actions warranted the award of the MG (Second Lieutenant McKay and Captain Shannon). All witnesses agreed that Lieutenant Colonel Gilbert displayed great skill in coordinating fire support and that the artillery effects were critical in the defeat of the enemy and probably saved lives.

120. The 2019 Tribunal reviewed Lieutenant Colonel Gilbert's actions against previously stated factors common in acts of gallantry. The Tribunal formed the view that every soldier and officer in the action on 21 September 1971 was personally under extreme threat. With the enemy surrounding them and being in such close proximity to each other, the group relied upon every man doing the job they were each individually trained to do and doing it well. The Tribunal, relying on the witness statements and the Official History, considered that there was clear evidence that all of the soldiers of the Company conducted themselves bravely and in accordance with their training.

121. The 2019 Tribunal considered that Lieutenant Colonel Gilbert was also acting bravely and in the best interests of the Company. He shared the risk and the threat that each soldier faced and he continued to do his job, demonstrating a high level of skill. The Tribunal noted that Lieutenant Colonel Gilbert had agreed during the hearing that the artillery fire could have been adjusted by others although arguably not as quickly or as well as he had done. The Tribunal also noted that Major General Ford, as a subject matter expert, had agreed that Lieutenant Colonel Gilbert was doing his job albeit under extreme circumstances.

122. The 2019 Tribunal was not reasonably satisfied that Lieutenant Colonel Gilbert's actions demonstrated a special and additional element of courage, fearlessness, daring or heroism. The Tribunal concluded that his actions reflected his training, role and responsibility and, although he performed with great skill and initiative, he did what was expected of him as a Forward Observer, bravely sharing the risk and coordinating artillery support under enemy fire. His actions were undeniably brave, but in the view of the 2019 Tribunal, it was difficult to reach a conclusion that he was gallant.

123. The 2019 Tribunal noted that the Imperial MID, if it had been recommended in 1971, was for 'an act of bravery' and the MC was for 'gallant and distinguished service in action'.⁴⁵ The Tribunal was of the view that, had Lieutenant Colonel Gilbert been nominated for recognition in 1971, he would have in all likelihood been recommended for the MID to reflect his 'act of bravery'. However, he was not nominated and these awards could no longer be considered.

⁴⁵ *Pamphlet on Military Honours and Awards 1960*, WO 12922, P.17 and 20.

124. **2019 Tribunal finding in relation to Gallantry.** Having considered the facts and reviewed Lieutenant Colonel Gilbert's actions against the previously stated factors common in acts of gallantry, the 2019 Tribunal found that for the purposes of the contemporary Gallantry Decorations Regulations, he did not perform acts of gallantry in action on 21 September 1971.

125. For those reasons the 2019 Tribunal decided that Lieutenant Colonel Gilbert was not eligible for the award of the MG or any other contemporary gallantry decoration.

Distinguished Service Assessment

126. **Australian Honours for Distinguished Service.** The Distinguished Service Cross (DSC), the DSM and the Commendation for Distinguished Service were established by Letters Patent on 15 January 1991 for the purpose of recognising members of the Defence Force and certain other persons for:

*distinguished command and leadership in action or distinguished leadership in action or distinguished performance of duties in warlike operations*⁴⁶

127. The Distinguished Service Decorations Regulations were amended on 13 December 2011 to omit 'in action' and insert 'in warlike operations' for the DSC and DSM.⁴⁷

128. Distinguished service awards are governed by the Regulations set out in the Schedule (as amended):

...

Conditions for award of the decorations

3. (1) *The Distinguished Service Cross shall be awarded only for distinguished command and leadership in warlike operations.*

(2) *The Distinguished Service Medal shall be awarded only for distinguished leadership in warlike operations.*

(3) *The Commendation for Distinguished Service shall be awarded only for distinguished performance of duties in warlike operations.*

4. *Each decoration may be awarded posthumously.*

...

Making of awards

⁴⁶ Commonwealth of Australia Gazette No. S25 – Distinguished Service Decorations Regulations - dated 4 February 1991.

⁴⁷ Commonwealth of Australia Gazette No. S18 – Amendment of the Distinguished Service Decorations Regulations - dated 22 February 2012.

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

...

129. **The Reason for Substituting ‘In Warlike Operations’ for ‘In Action’.** Noting that the Application for Review by Lieutenant Colonel Gilbert emphasised that in his view the DSM was inappropriate because the citation incorrectly characterised the hazardous circumstances in which the battle was fought as ‘warlike operations’ when in fact he was ‘in action, in close combat with the enemy’; the 2019 Tribunal asked Defence to address the reasons for the 2011 amendment during the hearing.

130. Defence said that when the DSM was instituted in 1991, to be ‘in action’ was to be physically present in a specific action involving direct conflict between opposing forces, reflecting the nature of war up to that date. Defence said that from around 2003, Defence senior leaders began to discuss expanding the existing Distinguished Service Decorations. With the nature and complexity of modern warfare, and the impact of modern communications and technology, the term ‘in action’ did not recognise command and leadership where an individual may not have been directly involved in a specific action yet had distinguished themselves in ‘war-like’ conditions. Defence said that the 2011 change was advanced in order to expand the scope of the award and to support greater recognition of an individual’s service in warlike operations. Defence said that the term was intended to be and is inclusive of the previous terminology ‘in action’.

131. **Lieutenant Colonel Gilbert’s DSM.** Lieutenant Colonel Gilbert told the 2019 Tribunal that he was advised that he would be awarded the DSM in a phone call from the Governor-General in late 2017. The citation for the DSM states that the award was for:

*distinguished leadership in warlike operations as Forward Observer, 12th Field Regiment attached to Delta Company, 4th Battalion, the Royal Australian Regiment, in Vietnam on 21 September 1971.*⁴⁸

132. **Appropriateness of the Award of the DSM?** The 2019 Tribunal noted that Lieutenant General Burr’s letter of 5 December 2018 had confirmed Lieutenant General Campbell’s decision that ‘a recommendation for distinguished service was the most appropriate category of recognition’.⁴⁹ In response to this letter, Lieutenant Colonel Gilbert disputed the accuracy of the Army Report and asserted that the CA should not have relied upon it as it failed to consider his ‘new evidence’. The 2019 Tribunal did not share this view. It went on to state that the facts of the action were not in dispute and the alleged new evidence was considered by the Tribunal its merits review.

⁴⁸ *Commonwealth of Australia Gazette* dated 6 February 2018.

⁴⁹ Letter from CA to the Tribunal OCA/OUT/2018/R35335920 dated 5 December 2018.

133. The 2019 Tribunal then turned to an assessment of the appropriateness of the award of the DSM to recognise Lieutenant Colonel Gilbert's actions on 21 September 1971. In assessing whether or not the award was appropriate, the Tribunal noted that the Regulations for the DSM states that it may be awarded:

only for distinguished leadership in warlike operations

134. **'Warlike Operations' or 'In Action'?** The 2019 Tribunal was reasonably satisfied with the explanation provided by Defence regarding the change from 'in action' to 'warlike operations' to contemporise the award. The Tribunal acknowledged Lieutenant Colonel Gilbert's views on the change but noted that the original purpose of the Distinguished Service Decorations allowed for recognition of individuals 'in action' or in 'warlike operations'.⁵⁰ Accordingly, the Tribunal was reasonably satisfied that the term 'warlike operations' is inclusive of circumstances traditionally referred to as 'in action'.

135. **Was Lieutenant Colonel Gilbert in a 'Leadership' Position?** The 2019 Tribunal next turned to assessment as to whether or not Lieutenant Colonel Gilbert was in a 'leadership' position noting that the medal may 'only be awarded for distinguished leadership ...' The Tribunal noted Lieutenant Colonel Gilbert's view that he was not for all intents and purposes in a leadership position, but rather an adjunct to the Company leadership group. The Tribunal also noted Defence's view that all officers are in leadership positions by virtue of their requirement to display leadership qualities in the performance of their duties. Lieutenant Colonel Gilbert disagreed with this view, saying it was too broad. The Tribunal also had difficulty with Defence's default characterisation which it considered to be all encompassing.

136. The 2019 Tribunal noted and gave significant weight to the expert opinion of Major General Ford which indicated that Lieutenant Colonel Gilbert was in a leadership position and was expected to assume the commander's role should the commander become a casualty. The Tribunal also gave weight to Lieutenant Colonel Gilbert's evidence that he participated in daily planning meetings with the remainder of the Company leadership group. The Tribunal gave some weight to the fact that Lieutenant Colonel Gilbert commanded and was therefore the leader of his Forward Observer Party of four other soldiers. The Tribunal was persuaded by the evidence of Major General Ford that Lieutenant Colonel Gilbert was in a position of leadership as opposed to only being an 'adjunct to leadership' as he had asserted.

137. For those reasons given above, the 2019 Tribunal found that Lieutenant Colonel Gilbert was in a position of 'leadership' on 21 September 1971.

⁵⁰ The Tribunal noted that the eligibility criteria for the DSC and DSM were originally 'in action' whilst the Commendation was 'in warlike operations'.

138. **Was Lieutenant Colonel Gilbert's Leadership Distinguished?** The 2019 Tribunal turned to an assessment of whether or not Lieutenant Colonel Gilbert's leadership could be considered to be 'distinguished'. In the absence of a definition of distinguished in the Regulations, the Tribunal decided that in this case a dictionary definition would provide a reasonable basis upon which to form an opinion. The Tribunal noted that application of the term 'distinguished' is subjective and that it is defined in the Oxford Dictionary as 'very successful, authoritative, and commanding great respect' and 'remarkable for or by the quality of excellence'.⁵¹ ⁵² The Tribunal considered that Lieutenant Colonel Gilbert's actions were distinguished in that the evidence pointed to the skilful manner in which he applied his craft, the remarkable way he was able to swiftly establish his location and excellence in his application of indirect fire in the most difficult of circumstances. All of this resulted in an outcome which was undeniably successful.

139. For the reasons given above, the 2019 Tribunal found that Lieutenant Colonel Gilbert's leadership on 21 September 1971 was distinguished.

140. **The Recommendation for the DSM.** In assessing whether the award was appropriate, the 2019 Tribunal also gave weight to the fact that the recommending officer was the professional head of the Army who, after deliberation, had decided that he would recommend the DSM. This was, in the view of the Tribunal, a decision open to the CA to make.

141. The 2019 Tribunal was of the view that an equally suitable award given the circumstances may have been the Commendation for Distinguished Service, which would have perhaps more accurately reflected Lieutenant Colonel Gilbert's 'distinguished performance of duties'. However, it stated that it was clear from the evidence and Defence's submissions that the CA may have been persuaded by the fact that Lieutenant Colonel Gilbert was in a leadership position as the Forward Observer and his actions undoubtedly had a significant impact on the outcome of the Battle. This likely led the CA to recommend the higher level of award. This was also a decision open to the CA to make and the recommendation is consistent with the eligibility criteria for that award.

142. **Finding in Relation to Appropriateness of the Award of the DSM.** Having considered the evidence and submissions and reviewed his actions, the 2019 Tribunal found that, for the purposes of the Distinguished Service Decorations Regulations, the award of the DSM to Lieutenant Colonel Gilbert for his actions as the Forward Observer with Delta Company, 4 RAR during Operation IVANHOE in the vicinity of Courtenay Hill, Phuoc Tuy Province, South Vietnam on 21 September 1971 was appropriate.

⁵¹ The Oxford Dictionary on-line accessed 18 February 2019

⁵² The Concise Oxford Dictionary, University Press, Oxford

143. **The Citation for the DSM.** Lieutenant Colonel Gilbert stated that the citation for the DSM was in error, particularly as it cited him as having facilitated a withdrawal when in fact the withdrawal was a ‘connector between events of the day and events of the night’.⁵³

144. His appeal was about what happened during the night operation and the citation made ‘no mention of the salient features’ that he believed constituted courageous behaviour in battle, no mention of his skill in determining his position and no mention of him calling in artillery to approximately 30 metres in a calm and collected manner by sound alone and then moving the fire around to break up an imminent attack. He also stated that the citation failed to make mention of him doing this whilst being subjected to rifle, machine gun tracer and rocket fire over his head.

145. The 2019 Tribunal reviewed the citation and agreed with Lieutenant Colonel Gilbert that it was inaccurate in a number of areas, poorly drafted and did not portray the accepted facts of the action. The citation also contained spelling errors. Accordingly, the Tribunal recommended that the citation be amended, as below:

For distinguished leadership in action as the Forward Observer attached to Delta Company, 4th Battalion, the Royal Australian Regiment, in warlike operations during the Battle of Núi L  in South Vietnam on 21 September 1971.

On 21 September 1971 during the Battle of N i L ; Delta Company, 4th Battalion, the Royal Australian Regiment, having been involved in close combat for the majority of the day found itself virtually surrounded by a numerically superior enemy force as night fell in thick jungle in Phuoc Tuy Province. The Company was reduced to 85 men and was in a rough defensive circle approximately 35 metres across. They were unable to move because of the darkness and lacked basic protection. They were running low on ammunition and were under constant fire from a strong and aggressive enemy force.

Captain Gilbert had spent the day coordinating artillery and air support which assisted the initial extraction of the Company, however he now found himself and the Company under heavy fire and unable to read his map in the darkness. Demonstrating remarkable skill, he was able to mentally calculate distances and angles to call in close artillery fire. Captain Gilbert adjusted the fire using sound alone and brought it to within 100 metres of the beleaguered Company. He then moved the fire incrementally around the perimeter for four hours, stalling the enemy’s potential assault and then forcing them to withdraw.

⁵³ Letter from Lieutenant Colonel Gilbert to the Tribunal dated 18 February 2019.

Captain Gilbert's bravery and skill under fire in extremely challenging circumstances, combined with his calm and considered tenacity in a leadership position, was critical in the defeat of the enemy and prevented Delta Company from suffering significant additional casualties. His distinguished leadership in action was in the finest traditions of the Royal Regiment of Australian Artillery and the Australian Army.

The 2019 Tribunal's Conclusion

146. The 2019 Tribunal formed the view that Lieutenant Colonel Gilbert's actions on 21 September 1971 were worthy of recognition at the time. While the reason he was not recommended or nominated was not known, his colleagues and Defence were unanimous that the situation should be redressed, albeit 45 years after the action. Whilst Lieutenant Colonel Gilbert was strongly of the opinion that his actions met the criteria for a gallantry award, the Tribunal did not share this view. The Tribunal found that his actions were undoubtedly brave and skilful and conducted under fire in extremely challenging circumstances, however it did not find the actions to be gallant for the purposes of the Gallantry Decorations Regulations. The Tribunal found that Lieutenant Colonel Gilbert was in a leadership position and that his leadership was distinguished, and that he therefore met the eligibility criteria for the DSM – the award that Defence recommended to 'redress' the failure to recognise him in 1971. The 2019 Tribunal appears to have given no consideration to whether or not the DSC might have been an alternative or better award.

Latest submissions

147. In his 2022 application to the Tribunal, Lieutenant Colonel Gilbert stated that, in his April 2021 application to the Directorate, he believed that General Campbell had erred in not giving sufficient weight to the *de jure*, and *de facto* command he had exercised during the battle. He went on to criticise Ms Cole's response as, in his view, she had not addressed any of the arguments made in his submission. He went on to state that there are two issues which he wished to address in the Tribunal, being those issues raised in his letter of 15 February 2021, in response to the *Jensen* decision. The first issue was:

"My first issue is whether the then CA (now the CDF) exceeded his legal authority after rejecting my submission for the award of the MG by awarding the DSM without my having been afforded the opportunity of appealing the rejection of my submission for the MG. In other words, should my appeal have properly been regarding the rejection of my submission for an MG and not regarding the awarding of the DSM?"

148. The second issue was:

"My second issue is that I was in a leadership position, as agreed by the Tribunal; I was in de jure command of my FOP, and I was in de facto command in taking sole command and responsibility for the artillery fire support for the Company. The circumstances were uncontestedly difficult, being surrounded, as we were, by an

elite unit of the NVA. The outcome was undeniably successful and at a higher standard than expected of others - it would not be a normal expectation for an FO to plot their location in the dark without a map whilst under close quarter attack. I submit that I demonstrated my skilful application of leadership and satisfied the criteria for distinguished command and leadership. The more appropriate award was therefore the DSC, not the DSM.”

149. In support of these issues, Lieutenant Colonel Gilbert stated that:

I have read the Tribunal's decision regarding Lt Jensen's submission and, in particular, where it dealt with command. I noted the criteria for command and saw that the size of the command was not a criterion. As you will recall, I was a Forward Observer (FO), commanded a Forward Observer Party (FOP), and had four soldiers under my command. These soldiers did not answer to the infantry commander while we were on operations; they answered to me.

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

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

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

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

For distinguished command, the Tribunal considered that the individual must be in a command role, regardless of rank.

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

It is clear from the Report on my appeal that there was no doubt in the Tribunal's collective mind that I exercised leadership in warlike operations but did I exercise distinguished command and leadership in warlike operations?

In other words, did I apply skilful leadership over others in the most difficult of circumstances where the outcome was undeniably successful and of a higher

standard than that expected of others in similar circumstances? I contend that I did. I have set out my reasoning below.

I commanded a FOP within 104 Field Battery RAA which was in Direct Support of 4 RAR/NZ during Operation Ivanhoe in September 1971. It was not Under Command. Direct Support meant it was 104 Battery's principal role to provide fire support to 4RAR/NZ. To accomplish this role FOPs were assigned to each of 4RAR/NZ's companies to facilitate the provision of intimate fire support. My FOP was assigned to D Company.

Under my command in the FOP were: an FO Assistant, a Bombardier, two Gunner signallers, and a Gunner batman. I planned the employment of these soldiers, I may have kept us together as a party or, for a particular operation or phase of an operation, I may have assigned my Assistant and one signaller to one of the platoons without reference to any higher authority. I was responsible for organising them, for directing them and coordinating their activities for the accomplishment of our assigned missions.

I oversaw their morale, welfare, health and discipline. If an infantry officer or soldier in D Company had an issue with one of my FOP, they came to me for resolution.

I contend that there is no question that I commanded my FOP but did I exercise distinguished command and leadership?

The Battle of Nui Le was a significant battle between B and D companies of 4RAR/NZ and the elite 33rd Regiment of the North Vietnamese Army (NVA). The battle raged from approximately 09:00 on 21 September 1971 until after 21:00 on the same day. B Company was involved in some action but the bulk of the battle involved D Company.

During the course of the daylight hours I was involved in initiating and directing artillery fire and coordinating air strikes. We had attacked a bunker system occupied by 33 Regiment in the late afternoon but were repulsed. We had to withdraw leaving a number of our colleagues KIA behind.

We withdrew to the south but unfortunately bumped into another NVA bunker system and drew small arms fire. It was not dear whether this bunker system was an alternative or one horn of a two horn ambush layout. By this time it was almost dark under the jungle canopy and as I took out my map to plot our location and plan Defensive Fire targets for the night, we were assailed by a fusillade of withering small arms fire. It was imperative to have artillery fire support in the shortest possible time. However, so that I could provide a target grid reference to the battery guns, I needed to know where we were, and I didn't, as I had not had time to work it out on my map. These circumstances were difficult enough but were compounded by the fact that I was unable to speak to the Company Commander (Coy Comd) who was about eight metres away from me. Every time I spoke I drew tracer fire directed at where the enemy thought my voice was coming from. In other words, I was unable to liaise with or receive instructions from the Coy Comd as I normally would have. I realised that, if we were to survive, it would be all up to my

taking the initiative and getting artillery fire accurately and quickly. In other words, I had to take de facto command of organising and delivering artillery fire support for D Company without reference to the Coy Comd. Indeed, at no time during that long night did I speak to the Coy Comd and he consequently had no input regarding what I did.

My only point of reference for my current location was where I had been in during the morning while the airstrikes were taking place. I thought I remembered the grid reference, but I couldn't be sure and, in the darkness (it was by now pitch black under the jungle canopy), I could not consult my map. However, time was critical. I knew the approximate direction we had taken when we withdrew and I had counted my paces. In the dark, lying on my stomach, with green tracer bullets passing centimetres above my head, I mentally solved a Pythagoras equation using the track we had followed as the hypotenuse and calculated the other two sides. One was the difference in eastings and the other the difference in northings. I then applied these eastings and northings to my assumed starting point from the morning and derived what I estimated to be our current location.

Using this location I sent fire orders to the guns and called in the fire. Obviously the significant danger was that I had got something wrong and the artillery would land on the company. I was also mindful that we were at the extreme range of the three guns that were in range and that therefore the zone of the fall of shot would be large along the line of fire. As the guns would be firing straight towards us, there was therefore an added risk of a round landing on us. I therefore had to try to plan for the fire to be alongside us in the first instance. In the event the artillery didn't land on us and I was able to bring the fire closer until it was about 25 metres from us. I then moved it around to cover all approaches to our position.

By seven or eight o'clock it was clear that the two horns had closed and trapped us. We were surrounded. The FO from B Company related to me recently that he heard me on the radio that night saying that the company was surrounded and that it looked like that was it for us. However, I didn't give up, I didn't stop, and we prevailed.

By about 21:00 enemy fire had petered out. However, to bolster morale and aid the Company in thinking we were not isolated and alone, I maintained a slow continuous rate of fire until about 01:00. I then stopped the firing but instructed the guns to remain laid on the last target they had fired to be ready for the dawn attack which we all expected.

Through my focus and calmness under fire, despite being deliberately fired at when I spoke and gave fire orders to the battery, I was able to calculate our position and thus bring effective artillery fire onto the NVA. It later transpired that it was the artillery which thwarted an attack by the NVA which had our position surrounded that night.

In a posthumously published memoir, then Captain Greg Dodds who was an Intelligence Officer at 1 ATF and who was in a helicopter above the battle during the day wrote:

On the evening of 21 September 1971, an elite NVA unit trapped a whole company of our soldiers in an ambush. There was absolutely nothing they could do to save themselves. But for the skill and courage of an artillery officer and the NVA commander being too clever by half, we would probably be adding 120 dead to that already miserable tally. The impact of such a loss - the biggest toll in any battle since World War 2 - would have been huge and our political history as a nation very different.

It is my submission that my actions during the Battle of Nui Le amply demonstrated the skilful application of leadership over others in the most difficult of circumstances where the outcome was undeniably successful and of a higher standard than that expected of others in similar circumstances.

Tribunal analysis of the present application

150. As already noted, it was agreed by Defence at the beginning of the hearing of Lieutenant Colonel Gilbert's current application for review that the sole question for consideration by the Tribunal in this matter is whether or not Lieutenant Colonel Gilbert's actions on the night of 21 September 1971 constituted "distinguished command" within the meaning of the Distinguished Service Decorations Regulations.

151. Those Regulations provide for the award of the Commendation for Distinguished Service for "distinguished performance of duties in warlike operations". The Tribunal considers that there is no question that Lieutenant Colonel Gilbert's actions met that description.

152. While the 2019 Tribunal queried whether or not that honour might have been "more appropriate" than the Distinguished Service Medal that he had been awarded, it nevertheless decided to affirm the decision to recommend him for the latter because his actions had demonstrated the required "distinguished leadership".

153. Notwithstanding that he acted unilaterally and did not call on the assistance of the members of the Forward Observer Party to whom he could have given orders during the incident in question, the Tribunal similarly accepts that Lieutenant Colonel Gilbert's actions constituted distinguished leadership. In the view of the present Tribunal this is because of the exemplary nature of what he did. "Leadership by example" is a well-accepted phrase and concept in everyday parlance and there is nothing in the Regulations to suggest that it might not be equally applicable in the context of them.

154. Lieutenant Colonel Gilbert's argued on this occasion that he also demonstrated "distinguished command".

155. Air Vice-Marshal Quaife argued that Lieutenant Colonel Gilbert should not be found to have done so because he was not in a “command role”. In this regard he relied on what was said by the Tribunal in the matter of *Hulse and the Department of Defence re: Jensen* [2020] DHAAT 15 (27 August 2020). In that case, the Tribunal said:

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

156. Air Vice-Marshal Quaife argued that being in a “command role” was different from being “in command”. To summarise what he said, the effect of his argument was that, notwithstanding Lieutenant Colonel Gilbert’s rank and appointment gave him the authority to give orders to the members of the Forward Observer Party of which he was thereby “in command”, he was not in a “command role”, whether actual or de facto, in the sense implied by the Tribunal in *Jensen*.

157. The Tribunal did not find Air Vice-Marshal Quaife’s arguments in this regard to be either clear or convincing. And, in any event, notwithstanding the phraseology used by the Tribunal in *Jensen*, the Regulations refer only to “command” and do not use the term “command role”. It was therefore not prepared to decide this matter on the basis argued by Air Vice-Marshal Quaife.

158. In any event, it became unnecessary for the Tribunal to reach a final concluded view on Air Vice-Marshal Quaife’s argument in this regard.

159. This was because Lieutenant Colonel Gilbert did not rely on his authority to issue orders to the members of the Forward Observer Party in asserting that he demonstrated “distinguished command” on the night in question. In the Tribunal’s view, he was correct in not doing so because, while those members may have been under his command, he acted unilaterally and did not exercise any power of command over them in calling in the artillery.

160. Nor did Lieutenant Colonel Gilbert assert that he was in command of the artillery that he called on to bring in fire on the enemy position (and which retained a discretion to refuse to comply with his call).

161. Rather, he argued that, at the crucial time, he was in command of the entire Company. In summary he argued that, because he and Major Taylor were unable to communicate with one another and Major Taylor was therefore unable to issue the order

to call in the artillery that was necessary to save the Company and because he was the officer within the Company to whom that order would have been issued, the responsibility for doing what was necessary fell to him and that, in calling in the artillery on his own initiative and without waiting for an order that could not be practically issued in the circumstances, he had responsibility for and was forced to assume command of the Company for that purpose and for that time.

162. In making this argument, Lieutenant Colonel Gilbert disputed the evidence of Major Taylor in the 2019 proceedings that they had settled between them “prearranged default procedures”. He said that he was not simply taking action that Major Taylor had previously directed him to take if certain circumstances arose, but that he was only exercising his own initiative. While noting that Lieutenant Colonel Gilbert appears not to have previously contested this element of Major Taylor’s earlier evidence, the Tribunal considered that accepting what Lieutenant Colonel Gilbert now said in lieu of that earlier evidence would not lead to any different outcome.

163. In the view of the Tribunal, there is no question that what Lieutenant Colonel Gilbert did was remarkable. He exercised extraordinary skill in calculating where the Company was likely to be and thus where the enemy was likely to be located and where the artillery should direct its fire. His decision to exercise his own initiative rather than waiting to be ordered to do so may indeed have saved the Company from further casualties or even from total annihilation. It is probable if not certain that he correctly anticipated the order that Major Taylor would have issued in exercise of his command of the Company had he been able to communicate with Lieutenant Colonel Gilbert.

164. But the Tribunal does not accept that anticipating an order that could or would be issued by a senior officer in exercising their power of command and thereby making the issue of that order confers on the act of anticipation the status of an act of command. Lieutenant Colonel Gilbert did not require an order from Major Taylor to call in the artillery - he did not commit a disciplinary offence by doing so. The artillery commander would have accepted the call without first ascertaining whether it had been ordered by an officer in a particular position and, of his own discretion, was empowered to and would have decided whether or not to direct the artillery fire that was called for.

165. In calling in the artillery Lieutenant Colonel Gilbert acted within the scope of his role and authority. He did not require an order from Major Taylor before doing so, even though Major Taylor may or even would have issued such an order had the circumstances enabled him to do so. Lieutenant Colonel Gilbert’s actions involved the distinguished performance of his duties and, because of the exemplary nature of what he did in that performance, was appropriately recognised as displaying distinguished leadership. But, in the view of the Tribunal, he did not exercise command in doing what he so remarkably did.

166. Section 110VC of the *Defence Act 1903* expressly provides that:

In reviewing a reviewable decision, the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision.

167. The effect of this is that, no matter how great its respect and admiration for Lieutenant Colonel Gilbert's actions on the night in question, the Tribunal is legally unable to recommend that he be awarded the Distinguished Service Cross that he has sought because it has concluded that those actions, notwithstanding their remarkable nature, did not meet the eligibility criteria specific to that honour. Accordingly, the Tribunal has no option but to affirm the reviewable decision. In doing so, however, the Tribunal stresses that Lieutenant Colonel Gilbert is able to wear with pride the Distinguished Service Medal he has been awarded with thanks from a grateful nation.

Tribunal decision

168. In light of the above, the Tribunal decided to recommend to the Minister that the decision of Ms Petrina Cole of the Directorate of Honours and Awards in the Department of Defence to refuse to recommend Lieutenant Colonel Gilbert for the Distinguished Service Cross be affirmed.