



Australian Government

Defence Honours and Awards Appeals Tribunal

Ryder and the Department of Defence [2023] DHAAT 17 (14 September 2023)

File Number(s) 2022/025

Re **Mr Brodrick Ryder**
Applicant

And **The Department of Defence**
Respondent

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

Hearing Date 10 August 2023

Attendances Mr Brodrick Ryder (Applicant)

Mrs Catherine Morris, Assistant Director,
Ms Katherine O'Callaghan, Manager Current Entitlements,
Directorate of Honours and Awards, Department of Defence
(for the Respondent)

DECISION

On 14 September 2023, the Tribunal decided to set aside the decision that Mr Brodrick Ryder not be recommended for the Australian Operational Service Medal (Civilian) with Clasp 'SOLOMON IS II' and to substitute for it a new decision that he be recommended for the Australian Operational Service Medal (Civilian) with Clasp 'SOLOMON IS II'.

CATCHWORDS

DEFENCE AWARD – Australian Operational Service Medal (Civilian) with Clasp ‘SOLOMON IS II’ – eligibility criteria – civilian contractor – definition of ‘employed’ - definition of ‘civilian’ – definition of ‘class of person’ as determined by the Chief of the Defence Force - Operation ANODE - not less than aggregate of 30 days.

LEGISLATION

Defence Act 1903 – Part VIIIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)

Defence Regulation 2016, Regulation 36

Australian Operational Service Medal Regulation 2012, Commonwealth of Australia Gazette S67, Letter Patent and Regulations, dated 6 June 2012

Australian Operational Service Medal Regulation 2012, Amendment 2015, Commonwealth of Australia Gazette G00827, dated 1 June 2015

Australian Operational Service Medal Regulations 2012 Amendment to Letters Patent 2020, Commonwealth of Australia Gazette G00629, dated 5 August 2020

Australian Operational Service Medal Regulations 2012 (Civilian) with Clasp SOLOMON IS II, Commonwealth of Australia Gazette G00260 dated Feb 2013, Governor General Declaration dated December 2012

Australian Operational Service Medal Regulations 2012, Chief of the Defence Force Determination, dated 24 November 2015.

Introduction

1. The Applicant, Mr Brodrick James Ryder, seeks review of a decision dated 23 November 2022 of Ms Nicole Masters of the Current Recognition Team of the Directorate of Honours and Awards in the Department of Defence (the Directorate), to refuse to recommend him for the Australian Operational Service Medal (AOSM) (Civilian) with Clasp 'SOLOMON IS II'.¹

Decision under review

2. On 17 February 2022, Mr Ryder applied to the Directorate for an assessment of his eligibility for the AOSM (Civilian) with Clasp 'SOLOMON IS II'.

3. Relevant to his application, Mr Ryder was employed by Hevilift (PNG), which was under a contractual arrangement with the Department of Foreign Affairs and Trade (DFAT). In the course of that employment as a civilian helicopter pilot, he flew Australian Defence Force and other Commonwealth personnel in the Solomon Islands between 22 November 2004 to 28 August 2006.² These services were rendered in support of the Regional Assistance Mission to the Solomon Islands (RAMSI). The Australian Defence Force contribution to RAMSI was known as Operation ANODE.

4. In response to the application, Ms Masters wrote to Mr Ryder on 23 November 2022 refusing the application and stating that:

For a Civilian to be eligible for the AOSM (Civilian) 'SOLOMON IS II', they must:

- a) be employed or contracted by the Commonwealth to support, in a civilian capacity, to the operations of a Defence Force deployed force; and*
- b) you must have signed the Defence Force Disciplinary Act 1982 (DFDA).*

After a review of your application it appears that you provided support to the Regional Assistance Mission to the Solomon Islands (RAMSI), which was an Australian Federal Police Operation.

Please note the AOSM - Civilian is a Defence award and recognises contributions specific to Defence's operations and is not representative of Whole of Government missions or other agencies contribution to a whole of Government mission.³

5. On 23 November 2022, Mr Ryder made application to the Tribunal seeking review of the above decision.⁴

Tribunal jurisdiction

6. 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

¹ Application for Review to the Tribunal Mr Ryder dated 23 November 2022, Folios 2-8

² Application for AOSM Solomon IS II by Mr Ryder dated 17 February 2022. Folio 46-51

³ Email, Directorate to Mr Ryder dated 23 November 2022. Folio 8

⁴ Application to Tribunal Mr Ryder Folios 2-8

within the Department of Defence to refuse to recommend a person for a defence award in response to an application.

7. Regulation 36 of the Defence Regulation 2016 lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 is the AOSM. Therefore, the Tribunal has jurisdiction to review decisions in relation to this award.

Mr Ryder's employment in support of RAMSI

8. Mr Ryder stated in his application to the Tribunal that his

operational service as a civilian was on "Operation ANODE" in the Solomon Islands. Operation ANODE was a combined task force (initially CTF 635) of the Australian Defence force (ADF, primarily Australian Army), and Australian Federal Police (AFP) elements. The multi-national joint force was known as the Regional Assistance Mission to the Solomon Islands (RAMSI). RAMSI was deployed under the Australian Government mandate.⁵

9. Mr Ryder further stated:

My role was that of helicopter pilot-in-command flying armed Australian troops, armed police and their equipment throughout the operational area...I was employed as a civilian helicopter pilot under a DFAT (Department of Foreign Affairs and Trade) contract to provide helicopter support to the deployed ADF (AFP) force. The contract was awarded to the aircraft operator, and in turn I was employed by the aircraft operator to fly the contracted helicopters. I was employed in this role for two years.⁶

The Australian Operational Service Medal

10. The AOSM was created by Letters Patent, dated 22 May 2012 and published in the *Commonwealth of Australia Gazette S67* of 6 June 2012.⁷ As per the Letters Patent, the award is governed by Regulations. Regulations were established with the Letters Patent on 6 June 2012. The Regulations were updated in 2015 as notified in *Commonwealth of Australia Gazette G00827* dated 1 June 2015.⁸ The Regulations were further updated in 2019, notified in *Commonwealth of Australia Gazette G00629* dated 05 August 2020.⁹

⁵ Application to Tribunal Mr Ryder dated 23 November 2022. Folio 5

⁶ Ibid Folio 6

⁷ *Australian Operational Service Medal Regulation 2012, Commonwealth of Australia Gazette S67, Letters Patent and Regulations*, dated 6 June 2012, Folio 22-27

⁸ *Australian Operational Service Medal Regulation 2012, Amendment 2015, Commonwealth of Australia Gazette G00827*, dated 1 June 2015, Folio 28-32

⁹ *Australian Operational Service Medal Regulations 2012 Amendment to Letters Patent 2020, Commonwealth of Australia Gazette G00629*, dated 5 August 2020. Folio 33-38

11. The Regulations as amended state:

3 Declared operation

(1) *The Governor-General may declare, in writing, on the recommendation of the Minister, that an operation is a declared operation.*

(2) *In making a recommendation to the Governor-General, the Minister must have regard to the recommendation of the Chief of the Defence Force.*

(3) *The Governor-General must not make a declaration about an operation unless:*

(a) *The operation is, or was, carried out in conditions that are, or were, hazardous; and*

(b) *The operation is not an operation for which recognition for an award (other than an award under this regulation) already exists; and*

(c) *The operation meets the conditions (if any) determined, in writing, by the Governor-General.*

...

(4) *A declaration under this section must include the following matters:*

(a) *the name by which the operation is known or a description of the operation; and*

(b) *the area in which the operation occurs or occurred; and*

(c) *either:*

(i) *the dates or period during which the operation occurred or*

(ii) *if the operation is continuing – the date on which the operation commenced.*

...

7 Civilians – award of the medal, standard civilian ribbon and clasp

The Governor General may, on the recommendation of the Chief of the Defence Force, award to a civilian who has given eligible service during a declared operation:

(a) *The medal; and*

(b) *A standard civilian ribbon; and*

(c) *A clasp denoting the declared operation.*¹⁰

12. On 12 December 2012, the Governor-General made a Determination under Regulation 4, which relevantly states:

(a) **declare**, under regulation 3 of the Regulations, the following operation in which persons rendered service, in the area comprising the total land area, territorial waters and subjacent airspace of the Solomon Islands to be a declared operation for the purposes of the Regulations;

(i) *Operation ANODE – that commenced on 24 July 2003*

¹⁰ *Australian Operational Service Medal Regulation 2012 Commonwealth of Australia Gazette G00827 dated 1 June 2015 Folio 28-32*

(b) **determine**, under Regulation 4 of the Regulations, that the conditions for award of the Australian Operational Service Medal (Civilian) with Clasp 'SOLOMON IS II' for that declared operation are that:

(i) the medal may be awarded to a civilian, as defined under regulation 2 of the Regulations, who was employed for duty as such a person of the declared operation for a period of not less than an aggregate of 30 days...¹¹

13. Relevant to Mr Ryder's application, on 30 April 2015 the Regulations were amended to repeal and substitute the definition of *civilian*, which now states:

Civilian means a person who:

- (a) *is employed or contracted by the Commonwealth to support, in a civilian capacity, the operation of a Defence Force deployed force; and*
- (b) *is:*
 - (i) *subject to the Defence Force Discipline Act 1982; or*
 - (ii) *included in a class of person determined, in writing, by the Chief of the Defence Force for the purposes of this definition.*

14. The *Operational Service Medal Regulations 2012 – Determination by the Chief of the Defence Force* dated 24 November 2015 states:

- (a) *Under section 2 of the Australian Operational Service Medal Regulation, I determine the persons described below to be a class of persons eligible for consideration for the Australian Operational Service Medal – Civilian:*
 - (i) *employed by the Commonwealth to support the operations of the Australian Defence force deployed force in a civilian capacity, and*
 - (ii) *deployed under the Department of Defence or the Department of Foreign Affairs and Trade portfolios and were not subject to the Defence Force Discipline Act 1982.*
- (b) *An individual classed as a class of person by this determination must also satisfy the other requirements of the Australian Operational Service Medal Regulation, in order to qualify for the award of the medal and/or clasp.*¹²

¹¹ *Australian Operational Service Medal Regulation 2012, Commonwealth of Australia Gazette G00260, dated 12 February 2013. Folio 39-41*

¹² *Australian Operational Service Medal Regulations 2012 (Civilian) with Clasp SOLOMON IS II, Commonwealth of Australia Gazette G00827 dated 1 June 2015. Folio 28-32*

Mr Ryder's application to the Tribunal

15. In his application to the Tribunal, Mr Ryder described his role as a civilian helicopter pilot as part of RAMSI which was deployed under Australian Government mandate. He stated that:

*RAMSI was primarily a police led operation, with the ADF playing a support role. Never-the-less, a significant Australian Army contingent was deployed on the operation to provide security. RAMSI relied on civilian operators for helicopter support under Department of Foreign Affairs and Trade contracts. Civilian registered helicopters and flight crew were used for personnel transport and logistical support, carrying armed Australian Army soldiers throughout the Solomon Islands. This was done under authority of Air Tasking Orders issued by the Australian commanders to the contracted aviation assets.*¹³

and:

I say I met the first of the required criteria for the Award in that I was employed as a civilian helicopter pilot under a DFAT contract to provide helicopter support to the deployed ADF (and AFP) force. The contract was awarded to the aircraft operator, and in turn I was employed by the aircraft operator to fly the contracted helicopters.

16. Mr Ryder further stated:

it is incomprehensible to find that I was not contracted by the Commonwealth on a deployed ADF operation (the required criteria for the Award) when the helicopter I was in command of was operating under the authority of an Air Tasking order issued by the Australian commander, my helicopter was full of Australian troops and their equipment, flying on a daily basis for two years, with the contracted services being paid for by DFAT.

*The second limb for refusing to grant the Award was under the guise of not being subject to the Defence Force Discipline Act 1982. This reason can't stand as there was no such requirement. The Determination of the Chief of the Defence Force, dated 24 November 2015 is explicit at paragraph (a)(ii) "Deployed under...the Department of Foreign Affairs and Trade portfolios and **were not subject to the Defence Force Act 1982.**"*¹⁴

The Defence Report

17. The Defence Report stated that, on behalf of the Australian Government, the AFP led the contingent of military personnel, police and civilians who participated in RAMSI, and that Operation ANODE was the operational name of the ADF element that deployed in support of RAMSI. This is somewhat contrary to Mr Ryder's submission that:

¹³ Application to the Tribunal, Mr Ryder dated 23 November 2022. Folio 5

¹⁴ Ibid Folio 6

Operation ANODE was a combined task force (initially CTF 635) of the Australian Defence force (ADF, primarily Australian Army), and Australian Federal Police (AFP) elements.

18. The Defence Report stated that Defence had reviewed records to confirm whether Mr Ryder was contracted by the Commonwealth to support, in a civilian capacity, the operations of a Defence Force deployed force and was subject to the DFDA.

19. Defence stated it was unable to find evidence that Mr Ryder was force assigned as a civilian to Operation ANODE in the PMKeyS system. Defence stated that it could find no evidence of an agreement signed by Mr Ryder to be subject to the DFDA.

20. Defence went on to state that the CDF Determination of 24 November 2015 does not apply to contractors. Rather, Defence submitted that *it instead applies to individuals employed¹⁵ by the Commonwealth to support the operations of the Australian Defence Force deployed force in a civilian capacity and¹⁶ deployed under the Department of Defence or the Department of Foreign Affairs and Trade portfolios and not subject to the Defence Force Discipline Act 1982.*¹⁷

21. In response to the Tribunal's request as to whether APS civilian staff from Defence, DFAT or the AFP who served on Operation ANODE had qualified for the award, Defence stated that:

- a. *There have been twelve individuals awarded the AOSM (Civilian) with Clasp SOLOMON ISLANDS II for service on Operation ANODE, all whom were APS civilian staff employed by the Department of Defence.*
- b. *There were no recipients from the Department of Foreign Affairs and Trade.*
- c. *There were no recipients from the Australian Federal Police. Sworn Officers of the Australian Federal Police who deployed in support of RAMSI are eligible for the Police Overseas Service Medal with Clasp RAMSI.*¹⁸

Mr Ryder's comments on the Defence Report

22. On 30 January 2023, Mr Ryder was provided with a copy of the Defence Report and invited to provide his comments on it. Among a range of submissions in his response of 8 February 2023, he said that the crux of the Department's reasons to deny the award substantively relied on two key points:

- a. the Department's opinion that the relevant CDF Determination does not apply to contractors; and
- b. the Department's misunderstanding of the nature of the service rendered to the deployed ADF force by civilian aviation contractors on Operation ANODE.¹⁹

¹⁵ Emphasis added by Defence.

¹⁶ Emphasis added by Defence.

¹⁷ Defence Report to Tribunal dated 25 January 2023 Folio 13

¹⁸ Defence Report to Tribunal dated 25 January 2023 Folio 14

¹⁹ Letter Mr Ryder to Tribunal, comments on the Defence Report dated 8 February 2023. Folio 17-21

23. Mr Ryder provided further comments and a link to the Wikipedia entry on RAMSI. In doing so, he stated that:

Pertinent to note the Regional Assistance Mission to Solomon Islands (RAMSI) was also known as Operation Helpem Fren, and Operation ANODE. This was a joint operation of the Australian Federal Police (AFP) as the lead Commonwealth Agency, supported by the Australian Defence Force (ADF) which provided security and logistical support.

24. Mr Ryder submitted that from July 2003 the ADF utilized its own aviation assets in the Solomon Islands as part of the initial deployment, but that these ADF helicopters were returned to Australia in 2004 and replaced with civilian helicopters which were contracted by the Commonwealth. He stated that Hevilift (PNG) provided two medium lift helicopters and Bristow provided two heavy lift helicopters and that these civilian helicopters took over the role of the ADF helicopters in supporting the RAMSI/ADF/AFP effort.

25. Mr Ryder further stated that the ADF again briefly deployed its own aviation assets to the Solomon Islands in response to the 2006 Honiara riots, and that when the ADF helicopters returned to Australia the Hevilift and Bristow civilian helicopters remained to support the ADF and AFP.

26. Mr Ryder submitted that it was not in contention that he rendered operational service to the ADF as a civilian helicopter pilot in the Solomon Islands on Operation ANODE. He stated that *the Tribunal should find it self-evident and not controversial that a civilian pilot flying armed Australian troops in civil registered helicopters in a declared operational area for two years is rendering service to the ADF.* Mr Ryder said that in the Department's submission it had misunderstood the nature of his role as being exclusive to the AFP, whereas in fact the civilian helicopters and aircrew carried out both AFP and ADF tasking.²⁰

27. Mr Ryder further submitted that:

the civilian helicopters were contracted by the Commonwealth and operated in support of both the deployed ADF force and the AFP contingent. The ADF commander issued Air Tasking Orders independently of the AFP commander. These flying orders were undertaken by civilian helicopters and aircrew for the ADF completely independent of the AFP. In other words, the civilian helicopters carried ADF personnel within Defence's own tasking ecosystem on missions in the operational area exclusively for the ADF, carrying ADF personnel and equipment. The contracted aviation support services were paid for by the Commonwealth, whether in the DFAT or Defence or AFP budget is moot to this Application.

28. Mr Ryder further asserted that the fact that the civilian helicopter contractor was also undertaking flight tasking for the AFP - separate to the ADF - did not inherently cause his application to fail. He went on to state that the required test is that the contributions were specific to Defence's operations, and that this test is satisfied by the

²⁰ Letter, Mr Ryder to the Tribunal, Comments on the Defence Report dated 8 February 2023. Folio 17-21

fact that the ADF commander issued Air Tasking Orders to the civilian contractor, and ADF personnel were flown on these missions in support of the whole-of-Government effort.²¹

29. Mr Ryder stated that, in his opinion, Defence's reasoning for its position on his eligibility for the award was difficult to fathom. He stated:

How is it that an individual employed by the Commonwealth directly as a contractor is in any way different to an individual who is employed by an entity which is contracted by the Commonwealth to render services? This position is needlessly narrow. I say, when it comes to the recognition of service, a contractor who is employed directly by the Commonwealth should be treated no differently to a contractor who has been hired by a third party to provide services to the Commonwealth. Regarding the second limb... it is not contentious that RAMSI was deployed either under the Department of Defence and/or the Department of Foreign Affairs and Trade portfolios.

30. Mr Ryder went on say that he relied on the CDF Determination which, in his view, very clearly 'opens up' the AOSM-Civilian Award to individuals employed by the Commonwealth to support the operations of the ADF in a civilian capacity who are not subject to the DFDA.

31. He stated that the Defence submission *does not cite any Authority to substantiate its view that a "CDF Determination does not apply to contractors"*. He stated that, in considering this point, the Tribunal should be mindful of the principles of statutory construction, and also a general fairness test, arguing that that the Regulations, and any Determinations or Instruments made under those Regulations, are made of a well-established statutory construction.

32. He observed that the purpose of the Regulations is to enable the AOSM to be awarded to persons who are employed on ADF operations in a declared operational area in recognition of hazardous service. He offered the view that, whether those persons are military, Defence civilians, or other civilians, the over-riding ambit of the award recognises the contribution of service of all people so engaged by the Commonwealth in a declared operational area. He argued that, on fairness principles, not only should military personnel be recognised for operational service, so too should Defence civilians and other civilians.

33. Mr Ryder argued that it is incongruous to the purpose and intent of the Award that ADF military personnel can be awarded an AOSM but the civilian pilot flying those personnel on those operations cannot, and that the operation is equally hazardous to all. He offered the view that the successful operational outcome is dependent on everybody undertaking their assigned duty, whether military or civilian.

34. Mr Ryder stated that *in publishing the Determination, quite plainly the CDF recognised the hybrid military/police/civilian nature of this particular ADF operation and opened the award of the AOSM to civilians who contributed to the operation, despite those civilians not being subject to the DFDA*. He went on to state that *the over-riding consideration is that service to the ADF in an operational area was rendered*. He said

²¹ Ibid Folio 18

that *the Department's requirement that a person be force assigned as a civilian, and employed directly by the Commonwealth, is administratively convenient but inconsistent with the wider interpretation of the statutory construction of the Regulations.* He argued that *the Regulations prescribe the definition of a civilian, simply being a person who is not an ADF member, and is employed or contracted to support in a civilian capacity the operations of a Defence Force deployed force, and is subject to the DFDA.* He stated that this fits exactly the role that the civilian pilots and aircrew undertook supporting the ADF on Operation ANODE, albeit they were not subject to the DFDA.

35. He went on to argue that it was open for the Tribunal to find that, where a Commonwealth entity has engaged a contractor to provide services to the ADF in an operational area, the employees of that contractor rendering those services ought to be deemed to be providing services to the ADF. Regardless of whether that service was rendered directly or indirectly, in his view, the Commonwealth contractor is still ultimately rendering service to the ADF.

36. In Mr Ryder's view, Regulation 7 empowers the Governor-General, on the recommendation of the Chief of the Defence Force, to award the AOSM to a civilian who has given eligible service during a declared operation. He argued that in this instance the CDF had determined that a civilian need not be subject to the DFDA to be considered for the award, and that quite plainly the CDF had recognised the peculiarities of Operation ANODE which saw ADF members, AFP officers, international partners and civilians all come together in a hybrid operation serving an Australian Government mandate. In his view, the CDF had recognized the very nature of the joint operation would lead to an inequity where ADF members would be eligible for an Award, AFP members would be eligible for a police award, yet civilian contractors who were critical to the success of the operation would receive no recognition at all. In his view, the Department's position was fundamentally unfair to the Australian civilian pilots who flew Australian troops in a declared operation who received recognition for their service. He put forward the view that the fundamental purpose of the legislation is to make the civilian iteration of the Award available to individuals who are not ADF members and who have rendered operational service to the ADF in a declared operational area, and that the Department erred in concluding the CDF Determination should not apply to contractors.

37. In respect of the 12 civilian APS staff who received the award, Mr Ryder offered the view that presumably they had been processed administratively and had their particulars entered into the PMKeyS system and had a clearly documented nexus between operational circumstances and satisfying the criteria for the award. He argued that the employees of Commonwealth civilian contractors do not get captured in that administrative process, so their particular circumstances need to be assessed individually on merit.

38. Mr Ryder concluded his comments on the Defence Report by providing a four point summary:

- 1. It is open for the Tribunal to find that civilian helicopter pilots and aircrew when tasked by the military commander to fly Australian military personnel in civil registered helicopters are supporting the operations of the ADF, and the Tribunal ought to make that finding.*
- 2. It is open for the Tribunal to find that a CDF Determination applies to*

civilian contractors, and the Tribunal ought to make that finding.

3. *In the instance the Tribunal finds that a CDF Determination applies to civilian contractors, it is open for the Tribunal to find the CDF Determination dated 24 November 2015 makes civilian contractors eligible for the AOSM (Civilian), whether they are subject to the DFDA or not.*
4. *If the Tribunal makes these findings above then it should remit my Application for the AOSM (Civilian) with Solomon Islands II clasp back to the Department for re-assessment.*²²

Tribunal consideration

39. It was not in contention that the service provided by Mr Ryder was in hazardous conditions or that he had met the minimum required period of 30 days.

40. Nor was it contended that Mr Ryder did not support, in a civilian capacity, the operation of a Defence Force deployed force. The fact that the Hevilift (PNG) contract was for the broader RAMSI operation rather than specifically for the ADF Operation ANODE simply meant that Mr Ryder supported both AFP and ADF operations as tasked from time to time.

41. Further, it was not in contention that Mr Ryder was not subject to the DFDA. That Act provides for disciplinary processes in respect of offences committed by a ‘defence member’ or a ‘defence civilian’. The latter is relevantly defined as a person other than a defence member who accompanies a part of the Defence Force outside Australia and who has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force. Mr Ryder agreed at hearing that he had not given such written consent and Defence had no record of him having done so.

42. Accordingly, the sole question before the Tribunal was whether or not Mr Ryder was a *civilian* as that term is defined in the Regulations. Contrary to the reasons given for the reviewable decision, it is not essential that a civilian is subject to the DFDA – they may also meet the eligibility criteria for the AOSM if they are within a class of persons determined by the CDF for the purposes of the definition of civilian.

43. There are two essential elements to the definition. The first is that the person in question must be *employed or contracted by the Commonwealth to support, in a civilian capacity, the operation of a Defence Force deployed force*; the second is that the person must be either subject to the DFDA or within a class determined by the CDF for the purposes of the definition.

44. In its report to the Tribunal and at the hearing, Defence did not assert that Mr Ryder did not meet the first element; rather, it claimed that he did not meet the second element because the class determined by the CDF was limited to employees and Mr Ryder was instead a contractor.

²² Letter Mr Ryder to Tribunal dated 8 February 2023. Folio 17-21

45. Notwithstanding that Defence did not take issue on whether or not Mr Ryder was *employed or contracted by the Commonwealth to support, in a civilian capacity, the operation of a Defence Force deployed force*, it was clearly essential for the Tribunal to form a view on this point.

46. Mr Ryder was employed by Hevilift (PNG). He was not an employee of the Commonwealth. Hevilift (PNG) had a contract with the Commonwealth to provide helicopter services and pilots to fly them. Mr Ryder did not have a contract with the Commonwealth.

47. Accordingly, if the term *employed or contracted by the Commonwealth* is interpreted literally, Mr Ryder could not qualify for the AOSM.

48. However, it is well recognised that a literal interpretation is not always to be applied. Departure from a literal interpretation is justified in *any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions*.²³

49. This principle is recognised in section 15AA of the *Acts Interpretation Act 1901* which provides that:

In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

50. By section 13(1) of the *Legislation Act 2003*, that provision applies to legislative instruments as if they were an Act. While Regulations made under Letters Patent may not be legislative instruments to which that Act applies, the Tribunal considered that the same principle of interpretation should be applied to them.

51. Unlike Acts of Parliament and Regulations made under them, Letters Patent and the Regulations giving effect to them are not accompanied by Second Reading Speeches, Explanatory Memoranda or similar documents that often explain the underlying policy intent. So, in seeking to identify the intent underlying the extension of AOSM eligibility to civilians, regard must be had only to the terms of the applicable Letters Patent and the Regulations themselves. In this case these are not at all expansive.

52. The Letters Patent indicate only that the purpose was simply *affording recognition to members of the Australian Defence Force and certain Australian civilians who render service in certain military operations*. This wording suggests that it is not all Australian civilians whose service is intended to be recognised, but only *certain* of them.

53. The Regulations originally made clear that it was only those civilians employed or contracted by the Commonwealth and who were subject to the DFDA who were to be eligible. The Regulations as amended made clear that being subject to the DFDA was no longer an essential element, by empowering the CDF to determine that other classes of persons may also be eligible. But none of these materials throw light on whether or not the phrase *employed or contracted by the Commonwealth* is to be interpreted literally.

²³ *Cooper Brookes (Wollongong) Pty Limited v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321

54. However, departure from the literal meaning and adoption of what is referred to as a purposive approach is also justified where that literal meaning would lead to results that may be described in terms such as absurd, inconsistent, extraordinary, capricious, irrational or obscure and that lead to the conclusion that such could not have been intended by the lawmaker.

55. Adopting a literal interpretation of the phrase *employed or contracted by the Commonwealth* would mean that:

- an Australian Public Service (APS) employee flying an ADF helicopter for the same purpose as Mr Ryder could be recognised by the AOSM;
- a non-APS employee of the Commonwealth doing the same could be recognised;
- an individual contracted by the Commonwealth for the same purpose could be recognised; and
- an individual contracted by the Commonwealth to fly a helicopter owned personally by themselves could also be recognised;

but:

- an individual flying a helicopter for that same purpose owned by a company of which they were the sole shareholder; and
- an individual employed by a company to fly a helicopter owned by the Commonwealth; and
- an individual employed by a company contracted by the Commonwealth to fly a helicopter owned by the company

could each not be recognised.

56. When it is recognised that the pilot in each of these various situations would be at the same risk in the same hazardous conditions performing the same service for the benefit of the Commonwealth, it appears to the Tribunal that those outcomes would be so inconsistent or extraordinary, or possibly even absurd, that they cannot have been intended.

57. Mr Ryder made a not dissimilar argument when he asserted that it was manifestly unfair that a pilot in his situation was denied recognition while an ADF pilot performing the same function was recognised. While acknowledging that he was not an employee of the Commonwealth, he claimed that he was indirectly employed by the Commonwealth.

58. The Tribunal was thus inclined to the view, from first principles of statutory interpretation, that the phrase *employed or contracted by the Commonwealth* was not intended to be interpreted literally and was instead implicitly intended to cover situations in which the Commonwealth secured the same benefit through employment or a contract other than directly by or with itself.

59. This view was reinforced by the position adopted by Defence and by the Minister for Defence in another matter.

60. In the case of *Wilson and the Department of Defence* [2021] DHAAT 13, Mr Corey Wilson sought the Afghanistan Medal and the Iraq Medal. As a civilian he had been employed by Boeing Australia Limited to operate drones in support of ADF operations in each of those countries. The Tribunal agreed with Defence that he did not meet the primary eligibility criteria for either of those medals. However, in each case the Regulations allowed the Minister to make a determination that could extend the category of eligible recipients to include a person such as Mr Wilson. As the Minister had never been required to turn his or her mind to the question of whether or not such a determination should be made, the Tribunal recommended that the matter should be submitted to the Minister for that purpose (without in any way suggesting what the outcome of that consideration should be). The Minister for Defence subsequently decided that he would not make a determination under either of the Regulations. In conveying that decision to the Tribunal, the Minister said that:

I believe Mr Wilson has received appropriate medallic recognition for his defence civilian service on Operations CATALYST and SLIPPER with the Australian Operational Service Medal (Civilian) with Clasp 'IRAQ 2003' and Clasp 'ICAT'.

56. In these circumstances, the Tribunal asked Defence why, if Mr Wilson was appropriately awarded the AOSM, Mr Ryder should not be similarly recognised given that neither was employed directly by the Commonwealth but by a company contracted by the Commonwealth.

57. On 29 August 2023 Defence wrote to the Tribunal in the following terms:

In the case of Mr Wilson, he deployed as a Defence Civilian, as an employee of Boeing Australia Limited who were at the time contracted by Defence to support Operation CATALYST (2007 and 2008) and Operation SLIPPER (2008/2009/2010) in order to deliver a specific operational outcomes for the Australian Defence Force deployed force.

Mr Wilson had signed and was bound by the Defence Force Discipline Act 1982 for each deployment and satisfied both sections of the eligibility criteria in the AOSM Medal Regulation Amendment 2015 where it states that a civilian means a person who:

- (a) is employed or contracted by the Commonwealth to support, in a civilian capacity, the operations of a Defence Force deployed force; and*
- (b) is: (i) subject to the Defence Force Discipline Act 1982;*

Defence does not dispute that Mr Ryder was involved with transporting Australian Defence Force personnel within the Solomon Islands. Defence contends that this service does not satisfy the eligibility criteria for the award. The contract for Hevilift to provide logistics services was in support of RAMSI. Mr Ryder was not deployed as a civilian under Operation ANODE to support an ADF operation and he did not sign the Defence Force Discipline Act 1982.

Defence maintains that the further criteria for the award through the CDF Determination of 24 November 2015 do not apply to Mr Ryder as he was not employed by the Commonwealth to support the operations of the Australian Defence

Force deployed force nor was he deployed under the Department of Defence or the Department of Foreign Affairs portfolio.

58. As is apparent from this letter, Defence did not seek to suggest that the AOSM had been awarded to Mr Wilson had been made in error, as it might have done consistently with the position taken in the decision under review in relation to Mr Ryder. Rather, it is evident from this submission that Defence accepted that Mr Wilson was *employed or contracted by the Commonwealth* notwithstanding that he was employed by Boeing which was contracted by the Commonwealth. This view must also have been adopted by the Minister for him to conclude that Mr Wilson was appropriately recognised by the AOSM.

59. As Mr Ryder's employment status was the same, the Tribunal was thus confirmed in its initial tentative view that he was similarly *employed or contracted by the Commonwealth* and thus met the first essential element of the definition of civilian in the AOSM Regulations.

60. As Defence noted, Mr Wilson had consented in writing to be subject to the DFDA. He thus met the second essential element. However, while Mr Ryder had not consented in writing to be subject to the DFDA, this did not preclude him being eligible for the AOSM if he met the second essential element through the alternative of being within a class of persons determined by the CDF.

61. To fall within that class, Mr Ryder had to be:

- (i) *employed by the Commonwealth to support the operations of the Australian Defence force deployed force in a civilian capacity, and*
- (ii) *deployed under the Department of Defence or the Department of Foreign Affairs and Trade portfolios and were not subject to the Defence Force Discipline Act 1982.*

62. Mr Ryder had no relevant contract, other than his contract of employment with Hevilift (PNG). In those circumstances, the Tribunal considered that he was 'employed' rather than 'contracted' and that he therefore met the requirement of paragraph (i) given that there was no apparent reason why the requirement to be employed 'by the Commonwealth' should be given any different meaning in the CDF determination from that it bore in the Regulations, as discussed above. The Defence contention that the CDF determination did not apply to contractors, while correct, was therefore considered by the Tribunal to be irrelevant.

63. Given that he was clearly not subject to the DFDA, the question thus became whether he was *deployed under the Department of Defence or the Department of Foreign Affairs and Trade portfolios*. It is not immediately clear what this phraseology means.

64. In Commonwealth administration, it appears that there is no such thing as a *Department of Defence portfolio a Department of Foreign Affairs and Trade portfolio*. According to the Australian Government Directory:

*A portfolio is a minister's area of responsibility as a member of Cabinet. Within each portfolio there are one or more departments, agencies, government appointed bodies, and/or other boards and structures.*²⁴

65. Presumably, therefore, the intention of the CDF determination was to refer to the *Defence or Foreign Affairs and Trade portfolios*.

66. But even substituting those words, the question becomes what *deployed under a portfolio* means.

67. The *Australian Defence Glossary* defines 'deployed personnel' as *Defence personnel assigned or employed in support of operations*. In the view of the Tribunal, Mr Ryder's allocation to duty by Hevilift (PNG) in accordance with Air Tasking Orders issued by Defence to Hevilift (PNG) means that he was *deployed* as he was clearly allocated in support of ADF operations whenever Defence issued an Air Tasking Order to Hevilift (PNG) and he was directed by Hevilift (PNG) to fulfil the requirements of that Order. Moreover, the Tribunal concluded that such deployment was *under* the Defence portfolio, given that the Order was issued by the ADF, that his relevant duties involved the transportation of ADF personnel and equipment and that the ADF is clearly a part of the Defence portfolio.

68. The Tribunal noted the Defence contention that *The contract for Hevilift to provide logistics services was in support of RAMSI. Mr Ryder was not deployed as a civilian under Operation ANODE to support an ADF operation*. It may well be that the Hevilift (PNG) contract was for the purposes of the larger RAMSI operation, rather than confined only to the Operation ANODE component of it, but nevertheless it required Hevilift (PNG) to provide helicopters and pilots to transport personnel and equipment devoted to Operation ANODE and that operation was clearly under the Defence portfolio. The fact that Hevilift (PNG), and through it Mr Ryder, could also be required to transport Australian Federal Police or other Commonwealth personnel was irrelevant in the view of the Tribunal.

69. The Tribunal therefore concluded that Mr Ryder was deployed under the Defence portfolio and, because he was not subject to the DFDA, was within the class of persons determined by the CDF and was thereby a *civilian* within the meaning of the AOSM Regulations and thus eligible for award of the AOSM.

Tribunal Decision

70. In light of all of the above, the Tribunal decided to set aside the decision that Mr Brodrick Ryder not be recommended for the Australian Operational Service Medal (Civilian) with Clasp 'SOLOMON IS II' and to substitute for it a new decision that he be recommended for the Australian Operational Service Medal (Civilian) with Clasp 'SOLOMON IS II'.

²⁴ Website, *Australian Government Directory, Portfolios*, <https://www.directory.gov.au/portfolios>, accessed 8 September 2023.