



Australian Government

Defence Honours and Awards Appeals Tribunal

Hartley and the Department of Defence re Swanton [2023] DHAAT 21 (20 December 2023)

File Number 2023/002

Re **Mr Chris Hartley LVO on behalf of Warrant Officer Class
Two Ronald Swanton**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Stephen Skehill (Presiding Member)
Major General Mark Kelly AO DSC (Retd)
Major Gary Mychael OAM CSM (Retd)

Appearances **For the Applicant:**
Mr Chris Hartley LVO
Mr David McLure SC
Mr Tim L'Estrange, Partner, Jones Day
Ms Jessica Sidi, Jones Day
Mr Michael Madden,
author *Dasher: The Kevin Wheatley VC story*

For the Respondent:
Air Vice-Marshal John Quaipe AM (Retd)
Historical Honours Review Officer, Department of Defence
Mr Ian Heldon
Directorate of Honours and Awards, Department of Defence

Hearing Date 8 November 2023

DECISION

On 20 December 2023, the Tribunal decided to recommend to the Minister that the decision that Warrant Officer Ronald Swanton not be recommended for an Australian gallantry decoration should be rejected and that Warrant Officer Swanton should be recommended for the Medal for Gallantry.

CATCHWORDS

DEFENCE HONOUR – Australian Gallantry Decorations - Vietnam War - 1965
- Australian Army Training Team Vietnam - attempted rescue of wounded soldier
- whether evidence available to consider recognition

LEGISLATION

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

Defence Regulation 2016 - Section 35

Australian Gallantry Decorations

Gallantry Decorations Regulations, Commonwealth of Australia Gazette No. S25,
dated 4 February 1991

Amendment of the Gallantry Decorations Regulations, Commonwealth of Australia
Gazette No. S420, dated 6 November 1996

Introduction

1. The Applicant, Mr Chris Hartley LVO, seeks review of a decision by the Army Historical Honours and Awards Reviewing Officer, Brigadier Mark Bornholt AM (Retd), of the Department of Defence, to refuse to recommend the late Warrant Officer Class Two Ronald James Swanton for an Australian gallantry decoration for his service in Vietnam. In particular, Mr Hartley seeks recognition for Warrant Officer Swanton's service in seeking to carry a wounded fellow soldier to the relative safety of cover during an engagement with the enemy while on patrol in Quang Nui Province on 13 November 1965. Warrant Officer Swanton was mortally wounded in the course of this action.

Decision under review

2. On 25 May 2022, Mr Hartley wrote to the Chief of Army seeking to have Warrant Officer Swanton recognised for his actions in Vietnam, particularly for the events of 13 November 1965 that ultimately led to his death. On 28 November 2022, Brigadier Bornholt wrote to Mr Hartley advising that he would not recommend retrospective recognition of Warrant Officer Swanton.¹

3. On 2 February 2023, Mr Hartley made application to the Tribunal seeking review of that decision.²

Tribunal jurisdiction

4. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence 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 Australian gallantry decorations are included in the defence honours listed in Regulation 35. Therefore, the Tribunal has jurisdiction to review decisions in relation to these defence honours.

5. As provided 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.

¹ Application for review submitted by Mr Hartley, 2 February 2023.

² Ibid.

Conduct of the review

6. In accordance with its Procedural Rules, on 8 February 2023 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Hartley's application for review.³ The Tribunal requested a merits-based assessment of Warrant Officer Swanton's actions against the eligibility criteria for the honour concerned 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 the documentation relied upon in reaching the decision and any other relevant documents.

7. On 18 April 2023, the Director of Honours and Awards in the Department of Defence provided a submission on behalf of Defence.⁴ The Defence submission consisted of a report written by Brigadier Bornholt, which in turn relied upon a research report written by Major J. Fardell, dated September 2022, and the original draft citation in support of the Victoria Cross awarded to Warrant Officer Class Two Kevin Wheatley, who was killed in action with Warrant Officer Swanton and was awarded the Victoria Cross for his service on 13 November 1965.

8. The Defence report was forwarded to Mr Hartley for comment on 26 April 2023. Mr Hartley responded with his comments on 21 July 2023.

Warrant Officer Class Two Swanton's service

9. Warrant Officer Swanton was drafted as a national serviceman into the Australian Military Forces on 3 May 1955 and transferred to the Australian Regular Army as an enlisted serviceman on 3 May 1961. He served until his death on active service in Vietnam on 13 November 1965. Warrant Officer Swanton was deployed to Malaya on 11 August 1956 and returned on 31 October 1957. He left Australia for service in Vietnam on 5 May 1965 and served with the Australian Army Training Team Vietnam.⁵

10. For his service, Warrant Officer Swanton was awarded the:

- a) Australian Active Service Medal 1945-75 with Clasps 'MALAYA' and 'VIETNAM';
- b) General Service Medal 1918-62 with 'Malaya' clasp;
- c) Vietnam Medal;
- d) Australian Defence Medal;
- e) Republic of Vietnam Campaign Medal;
- f) United States Meritorious Unit Commendation;

³ Letter, Tribunal Chair to Defence Secretary, 8 February 2023.

⁴ Letter, Directorate of Honours and Awards to the Tribunal, as submitted with the Defence report, 18 April 2023.

⁵ The Australian Army Training Team Vietnam (AATTV) was a specialist unit of military advisors of the Australian Army that operated during the Vietnam War. Raised in 1962, the unit was formed solely for service as part of Australia's contribution to the war, providing training and assistance to South Vietnamese forces.

- g) Republic of Vietnam Cross of Gallantry with Palm Unit Citation; and
- h) Republic of Vietnam Military Merit Medal.

11. The Tribunal understands that Warrant Officer Swanton is also eligible for the Anniversary of National Service 1951-1972 Medal, although this award currently remains unclaimed.⁶

12. In his response to the Defence Report, Mr Hartley stated that Warrant Officer Swanton had received an appointment as a Knight of The National Order of The Republic of Vietnam. Defence advised the Tribunal that it could find no evidence of such an appointment.

Mr Hartley's application on behalf of Warrant Officer Swanton

13. In his application to Defence of 25 May 2022, Mr Hartley stated:

...the actions of WO2 Ron 'Butch' Swanton who died in the same action as Warrant Officer Wheatley, 13 November 1965, although clearly documented, have been overlooked for an Australian Gallantry Decoration. Warrant Officer Swanton was mortally wounded whilst carrying a fellow soldier to the safety of cover and has never been recognised in Australia for his self-sacrifice.⁷

14. In his application to the Tribunal of 2 February 2023, Mr Hartley claimed that Warrant Officer Swanton was overlooked for a gallantry award due to an *administrative oversight* and disputed Defence's claim that there was a lack of certainty surrounding his actions on 13 November 1965. He said:

....the Department of Defence November 2022 review and decision, appears to have taken place in the absence of Private Ding Do's sworn contemporaneous testimony. This was prima facie and evidential and was used by the Department of Defence as part of Warrant Officer Class Two Kevin Wheatley's subsequent Victoria Cross citation in 1966, as evidenced by the Ministry of Defence records.

The December 2022 review also appears to have missed contemporaneous radio transmission records, in the field, between Warrant Officer Wheatley VC and his company commander. These describe Warrant Officer Swanton's actions and situation with some clarity.⁸

⁶ Information provided by the Defence Honours and Awards Directorate via email on 28 July 2023.

⁷ Letter, Mr Hartley to Lieutenant General Rick Burr AO DSC MVO, 25 May 2022.

⁸ Application for review submitted by Mr Hartley, 2 February 2023.

15. Mr Hartley then made the following observations regarding Warrant Officer Swanton:

1. The actions of Warrant Officer Swanton on the 13th November 1965 are well recorded. That they were obscured by the subsequent actions and death of Warrant Officer Wheatley VC, does not diminish the actions and courage of Warrant Officer Swanton.

2. The political and command structure at the time of Swanton's action had an inevitable impact on what should have been a clear case for recognition. This is not a criticism of the then command structure, it is simply an acknowledgement of the political, command and public environment at the time. Clarity of hindsight makes a compelling case that the lack of recognition was an administrative oversight.

3. On the ground in 1965, the Viet Cong were skinning prisoners alive. Given Warrant Officer Swanton's certain knowledge of the potential consequences of his actions, that reality puts into further context his selfless actions.⁹

The Defence report

16. As noted above, the Defence report prepared by Brigadier Bornholt relied upon a research report by Major Fardell. Whilst the bulk of the Defence report focussed on the actions of Warrant Officer Wheatley, Brigadier Bornholt stated the following in relation to Warrant Officer Swanton:

In relation to Warrant Officer Swanton, Mr Hartley does not provide any justification as to why he should be recognised and the only evidence about his actions on 13 November 1965 indicate that he was shot in either the abdomen or chest whilst carrying a wounded soldier to a safe location and died.

Warrant Officer Wheatley remained with Swanton and was also killed. In my view, and in the absence of verifiable evidence regarding Swanton's actions, it is highly likely that those who nominated Wheatley for the Victoria Cross would have been aware of the actions of Warrant Officer Swanton and chose not to recognise him as no nomination has been found.

In the absence of any further evidence, it is not feasible to proceed to review Warrant Officer Swanton's actions.¹⁰

⁹ Application for review submitted by Mr Hartley, 2 February 2023.

¹⁰ Defence report, 18 April 2023.

17. Brigadier Bornholt advised that he believed the research report prepared by Major Fardell provided *a suitable review of the merits of the applicant's claim* and that he *agreed with the recommendations contained therein*.¹¹ In relation to Warrant Officer Swanton, Major Fardell's research report stated the following:

35. Research Results - 13 November 1965 WO2 Swanton. Although the actions on the 13 November 1965 are well documented for WO2 Wheatley, there is limited 'comprehensive' information regarding the actions of WO2 Swanton and his role in the contact. All the available evidence centres around WO2 Swanton being wounded by gunfire whilst carrying a wounded Civil Irregular Defence Group (CIDG) soldier to a safe location. Although the witness statements vary slightly as to where WO2 Swanton was wounded (abdomen or chest), the wounds he received were fatal.

36. PVT Vo Trong Chan, the 'CIDG Medical Aidman', stated that he tended to WO2 Swanton's wounded abdomen and advised WO2 Wheatley that 'the wounded Australian was nearly dead.' The bodies of WO2 Wheatley and WO2 Swanton were discovered the following day and evacuated to Chu Lai.

37. There has been no evidence presented or found that would indicate that WO2 Swanton was ever considered for formal recognition for his efforts to carry the wounded CIDG soldier to safety. Whilst his actions could be described as 'courageous', these actions are what all service personnel are expected to perform in an attempt to preserve the life of a wounded comrade. There is no reason why the Chain of Command could not have considered or recommended WO2 Swanton for recognition whilst assessing the actions of WO2 Wheatley'.¹²

18. Major Fardell recommended that no further medallic recognition be considered for Warrant Officer Swanton's actions on 13 November 1965.¹³

Mr Hartley's comments on the Defence report

19. In his comment on the Defence report, Mr Hartley reasserted his view that there was enough documented evidence regarding Warrant Officer Swanton's actions on 13 November 1965 to suggest that he had been overlooked for an Australian gallantry award. Mr Hartley disputed Brigadier Bornholt's comment that Warrant Officer Swanton's actions were those that all service personnel were expected to perform in similar circumstances.

¹¹ Ibid.

¹² Research report by Major Fardell, dated 20 September 2022, as supplied with Defence report, 18 April 2023.

¹³ Ibid.

20. Mr Hartley drew parallels between the citation for what he believed was a similar action of Trooper Mark Donaldson who was awarded the Victoria Cross for Australia in 2009. He stated:

On 2 September 2008, Trooper Mark Donaldson rescued an interpreter under heavy enemy fire in Oruzgan province during Operation Slipper. The citation (in part) reads:

As the battle raged around him he saw that a coalition interpreter was lying motionless on exposed ground. With complete disregard for his own safety, on his own initiative and alone, Trooper Donaldson ran back eighty metres across exposed ground to rescue the interpreter and carry him back to a vehicle.

To re-quote Brig. Bornholt's view that such actions are "actions that all service personnel are expected to perform in similar circumstances", the action in Afghanistan was defined by others as "most conspicuous acts of gallantry in action in a circumstance of great peril."¹⁴

The events at the Quang Nui Province on 13 November 1965 and Warrant Officer Swanton's actions

21. Although the events of 13 November 1965 are reasonably well documented, there are comparatively limited sources of evidence concerning Warrant Officer Swanton's actions on that day.

22. *The Official History of Australia's Involvement in Southeast Asian Conflicts 1948-1975: To Long Tan, the Australian Army and the Vietnam War 1950-1966* only mentions Warrant Officer Swanton in relation to Warrant Officer Wheatley through an illustration,¹⁵ and in a list of endnotes as follows:

Warrant Officer K.A Wheatley and Warrant Officer R.J. Swanton were killed in action on 13 November 1965 when operating with US Special Forces in Quang Nui Province.¹⁶

23. However, in *The Team, Australian Army Advisers in Vietnam 1962-1972*, the author provides a more detailed overview of the events of the day and writes that Warrant Officer Swanton was part of a daily patrol team that searched and cleared areas suspected of harbouring a Viet Cong force. The patrols were planned by the officer commanding Tra Bong Special Forces A Team, Captain F. Fazekas, with the commander of the Vietnamese Special Forces A Team, Second Lieutenant Quang.

¹⁴ Mr Hartley's response to the Defence report, dated 21 July 2023.

¹⁵ McNeill I. (1993), *The Official History of Australia's Involvement in Southeast Asian Conflicts 1948 – 1975: To Long Tan, the Australian Army in the Vietnam War 1950-1966*, (First edition) St Leonards, NSW, Allen and Unwin in association with the Australian War Memorial, page 49

¹⁶ *Ibid*, page 497.

The company set out from the camp at 5 a.m. on 13 November....Accompanying the force were Fazekas, Warrant Officers 2 Wheatley and R. J Swanton, and Sergeant Theodore Sershen, USSF. Both Wheatley and Swanton were well experienced, having already served several months in Vietnam as advisers to battalions of the 1st Army of the Republic of Vietnam (ARVN) Division.

[...]

The company arrived at the start point for the search at 1.00pm and divided into three groups, with Wheatley and Swanton accompanying the third platoon and the combat reconnaissance platoon along the north-east.

The element accompanied by Wheatley and Swanton had at this stage crossed the track to Binh Hoa just north of a small bridge over the Suoi Tra Voi stream...Viet Cong snipers had opened fire on them from their rear, wounding one CIDG soldier. Just as Wheatley was in the process of organising his force, Viet Cong fire commenced from a group of dwellings south of the bridge. This fire quickly became intense, supported by machine-guns and automatic rifles. The CIDG were on the point of running when Wheatley attempted to rally them for an assault across the stream onto the main Viet Cong concentration. Swanton meanwhile had begun to carry a wounded Vietnamese soldier out of the line of fire...Wheatley now realised that the enemy resistance was too strong for them to handle and radioed Fazekas for assistance.

[...]

...the situation pressed heavily on Fazekas: the right flank group with Wheatley and Swanton appeared to have struck the main enemy force in the area...the patrol leader with Wheatley was not reacting and although the combined forces of the CIDG were sufficient to regain control of the situation, their commander, Quang, was unwilling to redeploy them.

[...]

It was now approximately 2.20 p.m., some forty minutes since the two platoons on the right flank had contacted the first elements of Viet Cong. Most of the CIDG with Wheatley had broken for the jungle. This left only Wheatley to provide covering fire for Swanton, who was still carrying the wounded CIDG soldier across the open paddy towards the thick, jungle-covered hill feature some 200 metres to their north...Then Swanton dropped the soldier he was carrying, himself

*shot through the chest. Bent double, Wheatley raced across to Swanton and dived down beside him.*¹⁷

24. The Australian War Memorial lists the events under consideration as part of the information relating to Warrant Officer Wheatley's VC:

On 13 November, Fazekas, Wheatley and Warrant Officer II Ron 'Butch' Swanton accompanied a unit of the Civil Irregular Defence Group (CIDG), consisting mainly of Montagnard (indigenous highland) troops, on a search and destroy mission in an area suspected of containing enemy forces. On arrival at their designated area, Wheatley and Swanton's group detached from the company and moved north east while Fazekas, the CIDG commander, Lieutenant Quang, and two platoons moved off to the north and north-west.

While sweeping through rice paddies near the village of Binh Hoa, Wheatley's platoon came under enemy sniper fire. A CIDG soldier was wounded as gun fire from the direction of the village grew in intensity. Swanton picked up the wounded soldier and began to carry him to the relative safety of the jungle beyond the rice paddies. Wheatley, realising that they faced a superior force, radioed Fazekas for support. Before they could reach refuge, however, Swanton suffered a serious gunshot wound to the abdomen. Wheatley, who had been providing covering fire for Swanton, rushed to the fallen Australian. He radioed for an air strike and a medical evacuation before he began dragging him to cover.

When Wheatley stopped briefly to return fire, CIDG medic, Private Vo Trong Chan, reached Swanton and bandaged his wound. By now the CIDG troops were withdrawing to the safety of the jungle and Trong Chan pleaded with Wheatley to leave the dying Swanton. Wheatley refused and, under heavy machine gun fire, continued to drag Swanton toward cover, around 200 metres away. When Wheatley neared the edge of the wooded area, CIDG Private Dinh Do came to assist him to some heavy undergrowth. Dinh Do, like Trong Chan, pleaded with Wheatley to leave Swanton but he again refused. When the Viet Cong were within 10 metres, Dinh Do turned and fled. As he left he saw Wheatley pulling the pins from his last two grenades, his other ammunition being exhausted.

The following morning Dinh Do led Fazekas to the spot where he had last seen the Australians. They found the bodies of Wheatley and Swanton lying in a

¹⁷ McNeill I (1993), *The Team, Australian Army Advisers in Vietnam 1962-1972*, (First edition) St Leonards, NSW, Allen and Unwin in association with the Australian War Memorial, pages 316-323.

*thicket. Fazekas wrote in his evidence that they had both been 'shot through the head several times at close range.'*¹⁸

25. An extract from Warrant Officer Wheatley's Victoria Cross draft citation describes the events as follows:

On 13 November 1965 at approximately 13:00 hours, a Vietnamese Civil Irregular Defence Group company commenced a search and destroy operation in the Tra Bong valley, 15 kilometres (9.3 mi) east of Tra Bong Special Forces camp in Quang Ngai Province. Accompanying the force were Captain F. Fazekas, senior Australian Advisor, with the centre platoon, and Warrant Officers K. A. Wheatley and R. J. Swanton with the right hand platoon. At about 1340 hours, Warrant Officer Wheatley reported contact with Viet Cong elements. The Viet Cong resistance increased in strength until finally Warrant Officer Wheatley asked for assistance. Captain Fazekas immediately organised the centre platoon to help and personally led and fought towards the action area. While moving towards this area he received another radio message from Warrant Officer Wheatley to say that Warrant Officer Swanton had been hit in the chest, and requested an air strike and an aircraft, for the evacuation of casualties.

At about this time the right platoon broke in the face of heavy Viet Cong fire and began to scatter. Although told by the Civil Irregular Defence Group medical assistant that Warrant Officer Swanton was dying, Warrant Officer Wheatley refused to abandon him. He discarded his radio to enable him to half drag, half carry Warrant Officer Swanton, under heavy machine-gun and automatic rifle fire, out of the open rice paddies into the comparative safety of a wooded area, some 200 metres away. He was assisted by a Civil Irregular Defence Group member, Private Dinh Do who, when the Viet Cong were only some ten metres away, urged him to leave his dying comrade. Again he refused, and was seen to pull the pins from two grenades and calmly awaited the Viet Cong, holding one grenade in each hand. Shortly afterwards, two grenade explosions were heard, followed by several bursts of small arms fire.

*The two bodies were found at first light next morning after the fighting had ceased, with Warrant Officer Wheatley lying beside Warrant Officer Swanton. Both had died of gunshot wounds.*¹⁹

¹⁸ [Victoria Cross: Warrant Officer Second Class K A Wheatley, Australian Army Training Team Vietnam | Australian War Memorial \(awm.gov.au\)](https://www.awm.gov.au), accessed 28 April 2023.

¹⁹ Draft Text of Citation, *Award of VC (Posthumous) to WO2 K.A. Wheatley*, NAA A1945, 133/3/30, Governor General's Office Honours and Awards file, p 95.

26. The contemporaneously documented accounts of relevant actions consist of statements by:

- a) CIDG soldier, Private Dinh Do;
- b) CIDG medic, Private Vo Trong Chan, who bandaged Warrant Officer Swanton's wounds;
- c) Warrant Officer Swanton's officer commanding, Captain Fazekas; and
- d) US Staff Sergeant Sershen who was with the patrol team on the day of the event.

Witness statement by Civilian Irregular Defense Group soldier,
Private Dinh Do

27. As referenced by Mr Hartley in his application, eye-witness Private Dinh Do observed Warrant Officer Swanton carrying a wounded CIDG soldier and saw him being hit in the abdomen or chest by the enemy. Private Do's witness statement provides the following:

I was a member of the CIDG combat reconnaissance on 13 November 1965 at BS455845 when our element was engaged by the VC at BS 456848.

The fight increased as more VC converged in the area from the village at BS455845. I saw WO Swanton carrying a wounded CIDG and he dropped the CIDG and I saw that he (WO Swanton) had been I wounded in the stomach while carrying the wounded man. The other Australian (WO Wheatley) was returning heavy VC fire at this time. My platoon and the other platoon that was with us started to run away when I saw WO Wheatley half dragging, half carrying WO Swanton from the rice paddy to some heavy undergrowth. I helped him (WO Wheatley) in the last stages and asked him to run with us. He refused to leave his friend and he pulled the safety pins from the grenades he had. I started to run when the VC were about ten metres away. Then I heard two grenades explode and several bursts of fire. This was the last time I saw the two Australian advisors alive...²⁰

²⁰ Witness statement by CIDG soldier Private Dinh Do, 15 November 1965.

Witness statement by Civilian Irregular Defense Group (CIDG) medic,
Private Vo Trong Chan

28. Eye-witness Private Vo Trong Chan's statement records that:

At approximately 1435 hrs one of the Australian advisors (WO Swanton), was hit in the abdomen by a round. I bandaged his wound and told the other Australian (WO Wheatley) that the wounded Australian was nearly dead. The VC firing was very heavy and I asked the Australian (WO Wheatley) to run with the rest of the Combat Reconnaissance Platoon and leave the dying Australian...²¹

Witness statement by Captain F Fazekas, Senior AATTV advisor

29. The Australian Army Training Team Vietnam report for the month of November 1965, signed by Lieutenant Colonel McNamara, provided information on casualties including a narrative regarding the death of Warrant Officer Swanton.²² It also included a copy of the report prepared by Warrant Officer Swanton's officer commanding, Captain Fazekas, who was on duty with him on the day of the mission but was not himself an eye-witness to his wounding or death. Captain Fazekas was subsequently awarded the Military Cross for his actions on 13 November 1965.²³

30. Captain Fazekas' report included the following information:

I was the senior AATTV advisor on the 13th and 14th November 1965 with the CIDG Company, which went out for a two day operation. ...Whilst resting the patrol commander, 2LT QUANG, LLDB, told me he would NOT move along the western creek of NUI HON DOAT to BS 445845 where the company was supposed to stage overnight...His reasons is that the valley in which the original route was planned was too dangerous for his coy. After some discussion I agreed to the change in plan. The company moved off and moved very close to the jungle edge on the Eastern side and I and also the other advisors, WO2 WHEATLEY, WO2 SWANTON and Ssgt SERSHEN agreed that we had been seen by the local population.

...When I contacted WO2 WHEATLEY he stated that they were in contact with the VC at BS 453848 but that they could handle it. They had one CIDG slightly wounded at this time. He also stated that the CIDG platoon commander was NOT doing anything at all and that he had just stopped...Some more

²¹ Witness statement by CIDG medical aidman, Private Vo Trong Chan, Combat Reconnaissance Platoon.

²² Australian Army Training Team Vietnam report for the month of November 1965.

²³ Citation for Captain Fazekas, award of Military Cross, Supplement to The London Gazette, 20th December 1966, NAA A2880 5/5/21 Governor General's Office Honours and Awards file.

conversations took place between 2LT QUANG and the platoon commander and at the same time the firing increased, I spoke to WO WHEATLEY again and he said they would require help. I told him we were on our way. I spoke to LT QUANG and told him to move his platoon into the fight area. He was very reluctant and only when I said I was going anyway did he agree... About half way back to the fight area S sgt SERSHEN shouted to me and said that WO SWANTON was hit in the chest and that WO WHEATLEY requested MEDEVAC and immediate airstrike..

I continued toward the fighting area where heavy firing was still going on and eventually arrived there with S sgt SERSHEN and about 15 CIDG. I called the mortar and machine gun forward but they did NOT arrive.

At this stage 2Lt QUANG stated that he gave orders to the platoon engaged in the fight originally to move back to BIEN HOA. Also that he was moving his own platoon back. I told him I would NOT move without the two Australians...

At this stage I was sure of it, the CIDG would NOT fight anymore, so I requested the NUNG reaction force to be brought in at 1620 hours. The reaction force arrived at 18—hours. I lead the reaction force to the fight area and placed them in two difference ambush positions at this stage it would have been fruitless to search. It was past 2030 hours and very dark.

The next morning at 0615 hours we commenced the search. We found the CIDG KIA and WO2 WHEATLEY and WO2 SWANTON together in a thicket shot through the head several times from close range...

From the position of the bodies it could be judged that WO2 WHEATLEY was dragging and carrying WO2 SWANTON from the open area to the thicket and stayed there with him, without a weapon, after the CIDG abandoned them, trying to help him and defend him.²⁴

Witness statement by Staff Sergeant Theodore Sershen, 5th Special Forces Group (USSF)

31. Staff Sergeant Sershen, who similarly was not an eye-witness to Warrant Officer Swanton's wounding or death, made a statement about the events on 13 November 1965 in which he said:

...We were about 150 metres from WO Wheatley and WO Swanton's position. I could hear Wheatley shouting "won't somebody help us,

²⁴ Statement by Captain Fazekas, 14 November 1965.

somebody do something” or words to that effect. As we moved through the heavy undergrowth we came out into a cleared area. Capt. Fazekas was crossing the rice paddy with about two other CIDG and myself when heavy firing broke out again from across the river. The CIDG patrol leader ran back into the brush area. Capt. Fazekas went to ground and returned fire to the river area with another CIDG soldier, the radio operator.

...the VC were moving at a fast walk and when the lead man stopped and fifteen to eighteen piled up behind him in a bunch. ...At the time this action took place we were only about forty metres from where we found two Australian bodies the next morning. At the time we did not know they were there but it was the approximate area where I heard WO Wheatley’s shouts. It is my opinion that WO Wheatley gave his life trying to save the life of WO Swanton. If it were not for this human sacrifice for a wounded friend, he could be alive today.²⁵

The Australian Gallantry Decorations

32. Australian service personnel received honours and awards under the Imperial system until February 1975 when the Government introduced the Australian system. The Imperial and the Australian systems then operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards.²⁶ This means that only contemporary Australian decorations may now be considered.

33. The Commonwealth of Australia Gazette (CAG) No S25 dated 4 February 1991 recorded the creation of the awards of the Star of Gallantry, the Medal for Gallantry and the Commendation for Gallantry by Letters Patent and the making of the *Gallantry Decorations Regulations 1991* (since amended as notified in CAG No. S420, dated 6 November 1996).²⁷

34. The Regulations set out the following eligibility criteria at Regulation 3:

(1) The Star of Gallantry shall be awarded only for acts of great heroism or conspicuous gallantry in action in circumstances of great peril.

(2) The Medal for Gallantry shall be awarded only for acts of gallantry in action in hazardous circumstances.

²⁵ Statement by Staff Sergeant T F Sershen, USASF undated.

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

²⁷ *Australian Gallantry Decorations Amendment to Regulations, Commonwealth of Australia Gazette No. S420*, dated 6 November 1996.

(3) The Commendation for Gallantry may be awarded for other acts of gallantry in action which are considered worthy of recognition.

3A. A decoration referred to in regulation 3 may be awarded for an act of a kind mentioned in relation to the particular decoration, although the act did not occur in action, if it occurred in circumstances similar to armed combat or actual operations and those concerned were deployed under military command.²⁸

Tribunal consideration

35. Brigadier Bornholt's decision of 28 November 2022 contained very little in response to Mr Hartley's application in respect of Warrant Officer Swanton, saying only the following:

In relation to Warrant Officer Swanton, you do not provide any compelling justification as to why he should be recognised. The only evidence regarding Warrant Officer Swanton's actions on 13 November indicate that he was shot in either the abdomen or chest while carrying a wounded soldier to a safe location and died. It appears that Warrant Officer Wheatley remained with Swanton and was also killed.

It is clear that those who nominated Warrant Officer Wheatley for the Victoria Cross would have been aware of the actions of Warrant Officer Swanton and chose not to recommend him. Army's research has not discovered any nomination or suggestion of recognition at the time. In the absence of further evidence, it is not feasible to proceed to review the merits of Warrant Officer Swanton's actions.²⁹

36. In his subsequent Defence Report of 9 March 2023 Brigadier Bornholt expressed his position in similar but somewhat different terms:

In relation to Warrant Officer Swanton, Mr Hartley does not provide any justification as to why he should be recognised and the only evidence about his actions on 13 November 1965 indicate that he was shot in either the abdomen or chest while carrying a wounded soldier to a safe location and died.

Warrant Officer Wheatley remained with Swanton and was also killed. In my view, and in the absence of verifiable evidence regarding Swanton's actions, it is highly likely that those who nominated Wheatley for the Victoria Cross would have been aware of the actions of Warrant Officer Swanton and chose

²⁸ Amendment to Gallantry Decorations Regulations, Commonwealth of Australia Gazette, No S420, dated 6 November 1996.

²⁹ Letter of 28 November 2022, page 2.

*not to recognise him as no nomination has been found. In the absence of any further evidence, it is not feasible to proceed to review Warrant Officer Swanton's actions.*³⁰

37. The Tribunal considered that these responses to Mr Hartley's application were comprehensively flawed, for multiple reasons:

- a) there is no burden of proof on an applicant (for either medallic recognition or for merits review of a decision refusing such recognition) to provide any evidence, let alone compelling evidence, in support of an application (although, of course, providing such evidence may enhance the prospects of a successful application);
- b) rather, the obligation on a decision-maker is to reach a decision on whatever evidence is available and to do so after making reasonable inquiry to obtain such additional material as may be foreseeably available;
- c) there was evidence available to Brigadier Bornholt on which he could have reached a decision on the merits of Mr Hartley's application;
- d) the evidence was more than verifiable – it was actually verified and corroborated;
- e) Brigadier Bornholt did not specify what additional information he might have required before reaching a substantive decision;
- f) nor did he provide Mr Hartley with the opportunity to provide any additional information which Brigadier Bornholt might have considered to be necessary;
- g) there is no evidence whatsoever that those who nominated Warrant Officer Wheatley for the Victoria Cross were in fact aware of the detail of the actions of Warrant Officer Swanton on 13 November 1965;
- h) the suggestion that they would have been so aware is thus purely speculative and no more justifiable than alternative speculation that they would not have been aware – the only Australian documentation concerning relevant events of the day were reports by Captain Fazekas who did not mention the circumstances in which Warrant Officer Swanton was fatally wounded (to which he was not an eye witness)³¹ and other reports that similarly did not recount the circumstances of Warrant Officer Swanton's wounding³² - the

³⁰ Defence report, paragraphs 19-20.

³¹ Report of 14 November 1965; Statement of 14 November 1965.

³² See, for example, AATTV report for November 1965.

documentation that did record eye-witness accounts was generated by American rather than Australian personnel;

- i) in any event, the fact that there was no nomination of Warrant Officer Swanton by those in command at the time is essentially irrelevant because it is the obligation of the primary decision-maker (and the Tribunal on review) to reach their own decision on whatever evidence might currently be before them; and
- j) because there was evidence of Warrant Officer Swanton's actions available to Brigadier Bornholt, it is incorrect to say that reviewing that evidence and reaching a decision was not feasible.

38. It appeared to the Tribunal that the position adopted by Brigadier Bornholt smacked of the position frequently taken by Defence before the Tribunal in the past but now discredited and no longer advanced – that is, that historical positions on medallic recognition should not be varied unless an applicant adduces evidence of maladministration or compelling new evidence. Air Vice-Marshal Quaife acknowledged this at the hearing and agreed that Brigadier Bornholt's phraseology was inappropriate.

39. Notwithstanding that acknowledgement, Air Vice-Marshal Quaife nevertheless argued against the award of a gallantry decoration to Warrant Officer Swanton. While he agreed that there was evidence of Warrant Officer Swanton's actions on 13 November 1965, he claimed that that evidence was inadequate to allow a decision to be made in favour of recognition. However, when pressed by the Tribunal to specify what further information would be required, he seemed to believe that it was the absence of evidence of Warrant Officer Swanton's state of mind that was the critical factor. The Tribunal rejected that position – honours and awards are granted on the basis of what an ADF member has done, and not what they were thinking at the time.

40. The positions of Brigadier Bornholt and Air Vice-Marshal Quaife were also at odds with the position of Major Fardell who clearly thought that there was evidence on which a decision on medallic recognition could be reached – albeit one that was in his view opposed to affording recognition.

41. The evidence before the Tribunal, as it was before Brigadier Bornholt, was as follows:

- a) the 15 November 1965 statement by CIDG Private Dinh Do in which he said *I saw WO Swanton carrying a wounded CIDG and he dropped the CIDG and I saw that he (WO Swanton) had been wounded in the stomach while carrying the wounded man*. That statement was reasonably contemporaneous to the events in question, was certified by the interpreter as being freely made and

fully agreed by the maker, and was witnessed by an American officer;

- b) the 15 November 1965 statement by CIDG Medical Aidman Private Vo Trong Chan that Warrant Officer Swanton was *nearly dead* as a result of that wounding. That statement was similarly reasonably contemporaneous to the events in question, certified by the interpreter as being freely made and fully agreed by the maker, and witnessed by an American officer;
- c) the statements in *The Team, Australian Army Advisers in Vietnam 1962-1972* which confirm that Warrant Officer Swanton *had begun to carry a wounded Vietnamese soldier out of the line of fire* and that *This left only Wheatley to provide covering fire for Swanton, who was still carrying the wounded CIDG soldier across the open paddy towards the thick, jungle-covered hill feature some 200 metres to their north...Then Swanton dropped the soldier he was carrying, himself shot through the chest;*
- d) the AWM record that *A CIDG soldier was wounded as gun fire from the direction of the village grew in intensity. Swanton picked up the wounded soldier and began to carry him to the relative safety of the jungle beyond the rice paddies. Wheatley, realising that they faced a superior force, radioed Fazekas for support. Before they could reach refuge, however, Swanton suffered a serious gunshot wound to the abdomen;*
- e) a 17 November 1965 US recommendation for a heroism award that records that *One CIDG medic ran to WO Swanton and bandaged the abdomen wound WO Swanton received while carrying a wounded soldier;* and
- f) the citation to the Victoria Cross awarded to Warrant Officer Wheatley which records that both he and Warrant Officer Swanton died of wounds inflicted by the enemy.

42. There is a suggestion in the biography of Warrant Officer Wheatley written by Mr Michael Madden³³ that Warrant Officer Swanton may have left a position of relative safety to go out into the open field of a rice paddy to seek to rescue the wounded CIDG soldier. However, at the hearing, Mr Madden clarified that that suggestion was unintended and he had no evidence to support such a proposition.

43. Accordingly, the Tribunal has proceeded on the basis that Warrant Officer Swanton was either with or in close proximity to the CIDG soldier when the latter was wounded – that is, that they were both in an open paddy field that offered little or no

³³ Madden M. (2021) *Dasher, the Kevin Wheatley VC Story*, (First Edition) Newport NSW, Big Sky Publishing.

protection against enemy fire.

44. In these circumstances, simple logic dictates that Warrant Officer Swanton would have had three options:

- a) he could have stayed where he was and sought to defend himself and the CIDG soldier with little protection available;
- b) he could have sought to withdraw by himself to a more protected position in the neighbouring wooded area by maintaining a low profile as he crawled through the rice paddy with covering fire from Warrant Officer Wheatley in a break contact drill, in the hope that the wounded CIDG soldier might later be rescued when the battle abated; or
- c) he could attempt to carry the wounded CIDG soldier to the neighbouring wooded area in the hope of more speedily safeguarding both of them.

45. The contemporaneous and unchallenged evidence makes clear that Warrant Officer Swanton chose the latter of these options. The evidence is also clear that it was in the course of this activity that he suffered the fatal wounding.

46. Again applying simple logic:

- a) option (a) may have involved the least immediate risk to Warrant Officer Swanton but may have entailed greater subsequent risk to both he and his wounded comrade if the enemy advanced or increased fire on their position;
- b) option (b) may have entailed lesser risk to Warrant Officer Swanton personally, but would have left his wounded comrade either incapable or less capable of defence;
- c) option (c) clearly involved the greatest risk to Warrant Officer Swanton. This option necessarily meant that he would have made himself a more visible target when he stood up to carry the CIDG soldier, that his pace of withdrawal would have been reduced because of the weight he was carrying, and that he would have had limited capacity to use his weapon to defend himself while seeking to reach the wooded area.

47. At the hearing, Air Vice-Marshal Quaipe did not seek to deny the options and consequences described in the preceding paragraphs, but still would not concede that Warrant Officer Swanton's actions warranted medallic recognition.

48. Major Fardell's report, on which Brigadier Bornholt relied, said in relation to Warrant Officer Swanton:

Whilst his actions could be described as 'courageous', these actions are what all service personnel are expected to perform in an attempt to preserve the life of a wounded comrade.

49. The Tribunal was not prepared to accept that Major Fardell's reasoning that Warrant Officer Swanton was simply 'doing his job' and thereby not deserving of medallic recognition. The Tribunal had no doubt that an ADF member is expected to take reasonable steps to save the life of a wounded comrade. But the Tribunal did not accept that an ADF member would be required to take every conceivable step regardless of the risk involved. The Tribunal considered that Warrant Officer Swanton would not have been in breach of his duty or otherwise liable to criticism if he had adopted either of option (a) or option (b). Accordingly, the Tribunal considered that, by adopting the more dangerous option (c), he exceeded the expectations reasonably imposed upon him.

50. The question thus became whether, in doing so, Warrant Officer Swanton acted gallantly as claimed by Mr Hartley.

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

The Tribunal considered that there is an expectation that all soldiers in battle conducting themselves in accordance with their training, will be acting bravely. The Tribunal considered that gallantry requires a higher standard of conduct than bravery and usually a special and additional element of courage, fearlessness, daring or heroism will have been demonstrated. What amounts to an 'act of gallantry', necessarily varies according to the individual circumstances of each action, and depending on many factors, including the level of threat, the person's training, role and responsibility, the risk to the individual and/or the group, and the consequences of undertaking, or not undertaking, the particular act.

The Tribunal considered that the concept of gallantry is greater than collective or individual acts of bravery and above and beyond what was expected of an individual or group who were bravely doing what they were trained to do or expected to do as part of a role, rank or responsibility.

52. Having regard to the evidence of Warrant Officer Swanton's actions in seeking to save the life of a wounded comrade and the above analysis of the risk that he undertook in adopting the most dangerous option for doing so, the Tribunal readily concluded

Warrant Officer Swanton did perform an act of gallantry by reference to the test adopted by the Tribunal in *Hanuszewicz and the Department of Defence re: Cameron*.

53. Having reached that conclusion, in order to ascertain which gallantry decoration might be appropriate it became necessary for the Tribunal to consider whether those acts of gallantry were simply *acts of gallantry in action ... worthy of recognition*, or *acts of gallantry in action in hazardous circumstances*, or *acts of great heroism or conspicuous gallantry in action in circumstances of great peril*.

54. In his previous written submissions, Mr Hartley sought only an *appropriate* gallantry decoration for Warrant Officer Swanton. However, at the hearing he refined that claim to more specifically seek the Star of Gallantry or, at the least, a Medal for Gallantry. Warrant Officer Swanton's actions were, he said, in excess of what was required for a Commendation for Gallantry.

55. There is no doubt that Warrant Swanton was *in action*. The Tribunal held no doubt that his actions were *worthy of recognition*. But in the view of the Tribunal it was apparent that the situation he was in was so dangerous and the risk to his own life that he took was so great as to justify the conclusion that he undertook his actions in *hazardous circumstances*. This meant that the Tribunal considered that the eligibility criteria for the Commendation for Gallantry were met and exceeded and that those for the Medal for Gallantry were at least met.

56. However, without in any way wishing to belittle the significance of Warrant Officer Swanton's actions, the Tribunal was not satisfied that those actions met the more demanding criteria of *great heroism or conspicuous gallantry in action in circumstances of great peril*. He undoubtedly displayed *heroism*, but the Tribunal was not satisfied that it justified the adjective *great*; and even if his gallantry was *conspicuous*, the Tribunal was not satisfied that the circumstances were so far beyond hazardous as to involve *great peril*. The fact that Warrant Officer Swanton was killed in the course of performing an act of gallantry does not necessarily mean that the circumstances entailed *great peril*. Hazardous circumstances may equally involve the risk and actuality of death.

57. In reaching this conclusion, the Tribunal noted that Mr Hartley had not advanced any analysis of the circumstances of the battle on 13 November 1965 in support of his claim for a Star of Gallantry. Instead, he made reference to other cases involving efforts to save the life of wounded comrades for which medallic recognition had been awarded. In so doing, however, he did not provide any analysis of the degree, if any, to which those other cases were comparable to the circumstances of Warrant Officer Swanton.

58. There are numerous previous instances in which ADF members have been recognised by honours of various levels for actions they have taken in endeavouring to save the lives of comrades. At the hearing Air Vice-Marshal Quaipe disputed the relevance of those cases by saying that honours decisions are not made on any strict basis of precedent, because no two cases are ever identical. However, the Tribunal also noted (and agreed with) the principle enunciated by the Committee of Inquiry into Defence and

Defence Related Awards, the recommendations of which were accepted by the Government on 19 April 1994, that:

To maintain the inherent fairness and integrity of the Australian system of honours and awards care must be taken that, in recognising service by some, the comparable service of others is not overlooked or degraded.

59. Air Vice-Marshal Quaife's responded to the Committee's reference to that principle by asserting that there were many cases where an ADF member had not received medallic recognition for attempting to save the life of a comrade. That response however was viewed by the Tribunal as providing no answer. Every such case should receive any appropriate recognition as it comes to attention. To perpetuate the failure to confer warranted recognition in this or any other case that came to attention on that basis would simply infringe the time-honoured maxim that *'two wrongs don't make a right'*.

60. The Tribunal thus examined each of the other cases to which Mr Hartley made reference. It did so not for the purpose of applying precedent as such, but rather to test conformity to the principle that comparable service should receive comparable recognition *To maintain the inherent fairness and integrity of the Australian system of honours and awards.*

61. The cases raised by Mr Hartley were as follows:

- a) Major General Sir Neville Reginald Howse, VC, KCB, KCMG, FRCS, who was awarded the Victoria Cross for his actions on 24 July 1900;
- b) Corporal Mark Donaldson VC who was awarded the Victoria Cross for his actions on 2 September 2008;
- c) On 26 November 2006, a soldier identified only as Sergeant A from 4 RAR (Commando) became the first recipient of the Star of Gallantry;
- d) On 18 August 2008, Lieutenant Colonel Harry Smith was awarded the Star of Gallantry for his leadership and gallantry during the Battle of Long Tan in the Vietnam War;
- e) On Australia Day 2010, special forces soldier Private S received the Star of Gallantry *for acts of conspicuous gallantry in action in circumstances of great peril while a lead scout in Afghanistan in 2008;*
- f) On Australia Day 2011, special forces soldier Sergeant P received the Star of Gallantry *For acts of conspicuous gallantry in action in circumstances of great peril while on Operation SLIPPER in Afghanistan in June 2010 during the Shah Wali Kot Offensive;*

- g) On 13 June 2011, special forces soldier Sergeant D was awarded the Star of Gallantry in the 2011 Queen's Birthday Honours for *conspicuous gallantry in circumstances of great peril* while serving with the Special Operations Task Group;
- h) On 13 June 2011, special forces soldier Private S was awarded the Star of Gallantry in the 2011 Queen's Birthday Honours for *conspicuous gallantry in circumstances of great peril* while serving with the Special Operations Task Group.
- i) On 9 June 2014, special forces soldier Private B was awarded the Star of Gallantry for *conspicuous gallantry in action in circumstances of great peril* while on operations on Operation SLIPPER.
- j) On 17 July 2017, Captain Raymond Jesse Allsopp was awarded the Star of Gallantry for gallantry during Operation Oboe Two during the Second World War. A Medical Officer, Allsopp served with the 2/5th Commando Squadron and was killed in action at Balikpapan, on 1 July 1945.

62. The Tribunal considered that the awards of the Victoria Cross to Major General Howse and to Corporal Donaldson were made for service which was markedly more extreme than that of Warrant Officer Swanton and that accordingly their service was not comparable to that of Warrant Officer Swanton. [While not cited by Mr Hartley, the Tribunal also noted that the service for which it had recommended the award of the Victoria Cross to Private Richard Norden was similarly far more extreme and not comparable to that of Warrant Officer Swanton.] Accordingly the Tribunal considered that these cases, notwithstanding that they involved actions to save a comrade, provided no support for award of a Star of Gallantry (or indeed any other honour) to Warrant Officer Swanton.

63. With respect to the Star of Gallantry awards mentioned by Mr Hartley, the Tribunal considered that:

- a. The service actions for which Sergeant A, Lieutenant Colonel Smith, Private S (2010), Sergeant P and Private B were awarded the Star of Gallantry bore no real similarity to that of Warrant Officer Swanton and were thus in its view not comparable;
- b. The actions for which Sergeant D was awarded the Star of Gallantry were markedly more extreme than those of Warrant Officer Swanton and for that reason not comparable; and
- c. Captain Allsopp was awarded the Star of Gallantry for multiple actions in which he went forward to save the lives of wounded comrades and his service was thus materially more extreme than that of Warrant Officer Swanton; moreover, there

was greater available detail about the warlike environment in which Captain Allsopp acted which more readily allowed a finding of *great peril*.³⁴

64. The Tribunal thus concluded that the cases to which Mr Hartley referred did not provide any strong argument that the actions of Warrant Officer Swanton warranted the an award of a Star of Gallantry on the basis of comparability.

65. The Tribunal considered also the nature of the service for which awards of the Medal for Gallantry were made to each of Corporal Cameron Baird VC MG, Sergeant Brett Wood MG DSM, Major Mark Augustine Moloney MG, Corporal B MG and Sergeant Blaine Diddams MG. While none of those cases was a direct parallel to that of Warrant Officer Swanton, the Tribunal considered that Warrant Officer Swanton's actions had more in common in a general sense with those cases than with any of the Star of Gallantry cases on which Mr Hartley relied.

66. Accordingly, the Tribunal concluded that Warrant Officer Swanton's actions on 13 November 1965 met the eligibility criteria for the Medal for Gallantry but did not meet the eligibility criteria for the Star of Gallantry, and thus should be recognised by an award of the Medal for Gallantry.

67. For completeness and in recognition that Defence honours are awarded in exercise of executive discretion rather than as a matter of entitlement where the eligibility criteria are met, the Tribunal notes that it is aware of nothing in Warrant Officer Swanton's service records that could constitute any countervailing circumstance which might suggest he should not receive that medallic recognition.

Tribunal Decision

68. In light of all of the above, the Tribunal decided to recommend to the Minister that the decision that Warrant Officer Class Two Ronald Swanton not be recommended for an Australian gallantry decoration should be rejected and that Warrant Officer Swanton should be recommended for the Medal for Gallantry.

³⁴ See *Allsopp and the Department of Defence Re: Allsopp [2016] DHAAT 31 (25 August 2016)*