



Australian Government

Defence Honours and Awards Appeals Tribunal

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

File Number 2023/001

Re **Mr Chris Hartley LVO on behalf of Warrant Officer Class Two Kevin Wheatley VC**
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 George Wheatley
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
Director 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 to not recommend Warrant Officer Wheatley for an Australian Gallantry Decoration be rejected and that Warrant Officer Wheatley should be recommended for the Medal for Gallantry for his actions on 28 May and 18 August 1965 (as described in the draft citation authorised by Lieutenant Colonel McNamara and Brigadier Jackson).

CATCHWORDS

DEFENCE HONOUR – Australian Gallantry Decorations – Vietnam War – 1965
– Australian Army Training Team Vietnam – prior recognition with Imperial Victoria Cross – amended citation – conditions of Royal Warrant for Imperial Victoria Cross - bravery and gallantry – rescue of civilian under fire

LEGISLATION

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

Defence Regulation 2016 - Section 35

Australian Gallantry Decorations

Letters Patent for the Gallantry Decorations and 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

Victoria Cross for Australia

Letters Patent for the Victoria Cross for Australia, Commonwealth of Australia Gazette No. S25, dated 4 February 1991

Determination for the Victoria Cross for Australia, Commonwealth of Australia Gazette No. SG00965, dated 6 September 2017

Distinguished Service Decorations

Letters Patent for the Distinguished Service Decorations, Commonwealth of Australia Gazette No. S25, dated 4 February 1991

Amendment to Letters Patent for the Distinguished Service Decorations, Commonwealth of Australia Gazette No. S18, dated 22 February 2012

Determination for the Distinguished Service Decorations, Commonwealth of Australia Gazette No. S125, dated 1 August 2012

Introduction

1. The Applicant, Mr Chris Hartley LVO, seeks review of a decision by the Army Historical Honours Reviewing Officer, Brigadier Mark Bornholt AM (Retd), of the Department of Defence, to refuse to recommend the late Warrant Officer Class Two Kevin Arthur Wheatley VC for an Australian gallantry decoration for his actions on 28 May 1965 and 18 August 1965 while serving in Vietnam. Warrant Officer Wheatley was killed in action during a battle while on patrol at the Quang Nui Province on 13 November 1965 and posthumously received the award of the Imperial Victoria Cross for his service on that date.

Decision under review

2. On 25 May 2022, Mr Hartley made application to the Chief of Army seeking that Warrant Officer Wheatley be considered for additional gallantry awards for two separate actions which occurred on 28 May 1965 and 18 August 1965 while he was serving in Vietnam.¹

3. On 28 November 2022, Brigadier Bornholt wrote to Mr Hartley advising him that he would not recommend Warrant Officer Wheatley for further recognition. Brigadier Bornholt stated that the original nomination for Warrant Officer Wheatley's Victoria Cross had included the events of 28 May and 18 August, as well as the event of 13 November 1965. Despite the events of 28 May and 18 August being removed from the final citation, Brigadier Bornholt believed that Warrant Officer Wheatley *was nominated for the Victoria Cross for three separate actions cumulatively* and that *he was awarded the Victoria Cross for acts of heroism, determination and unflinching loyalty in the face of the enemy.*²

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

Tribunal jurisdiction

5. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the 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 such defence honours.

¹ Application for Review submitted by Mr Chris Hartley LVO, dated 2 February 2023.

² Ibid.

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

Conduct of the review

7. 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 Wheatley's actions against the eligibility criteria for the honours concerned, a report on the material questions of fact, and reasons for the decision to refuse the original application. The Tribunal also requested that the Secretary provide copies of documentation relied upon in reaching the decision and any other relevant documents.

8. 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 that referred to a research report by Major J. Fardell dated September 2022, and which was said to have attached the original draft citation in support of the Victoria Cross awarded to Warrant Officer Kevin Wheatley.

9. The Defence report was forwarded to Mr Hartley for comment on 26 April 2023. Mr Hartley responded with his comments on 23 July 2023. On 7 November 2023 Mr Hartley provided additional submissions prepared by Mr McLure.

10. The Defence report, while attaching the report of Major Fardell, did not include the various attachments to that report. Nor did it attach the original draft citation despite stating to the contrary. Further, it did not attach numerous other documents of relevance that were either in the possession of the Department or otherwise available to it. The Procedural Rules made under section 110XH of the *Defence Act 1903* require that a Defence report contain or draw to the Tribunal's attention all relevant documents under the Department's control or in its attention.⁵ Additionally, the Chair's letter to the Secretary in respect of this particular application drew specific attention to that requirement.⁶

11. However, research by the Tribunal Secretariat located a large number of such other relevant documents, and Mr Hartley provided others. Accordingly, by the time of the hearing on 8 November 2023 the Tribunal and those appearing before it had a comprehensive collection of relevant documentation for consideration. [While pointing out the deficiencies in the

³ Correspondence from Tribunal to Defence Secretary dated 8 February 2023.

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

⁵ *Defence Honours and Awards Appeals Tribunal Procedural Rules 2021*, Rule 9.

⁶ Correspondence from Tribunal Chair to Defence Secretary, dated 8 February 2023.

Defence report in this case, the Tribunal does wish to stress that this was an unusual occurrence and that its general experience is that Defence reports in other cases are usually well and comprehensively prepared.]

12. At the hearing on 8 November 2023 the Chair drew to the attention of the applicant that:

- a) Brigadier Bornholt, who made the decision under review, had previously served as a Member of the Tribunal;
- b) Air Vice-Marshal Quaife, who was representing Defence at the hearing, had similarly previously served as a Member of the Tribunal;
- c) he had accordingly considered whether those previous connections raised any conflict of interest in the composition of the panel assigned to the present application but, subject to any contrary submission that might be raised by the applicant, had concluded that there was no such conflict, whether actual or justifiably perceived, because:
 - i. Brigadier Bornholt's term had concluded before each member of the present panel was appointed to the Tribunal;
 - ii. Air Vice-Marshal Quaife's term had concluded before the appointments of Major General Kelly and Major Mychael;
 - iii. while Air Vice-Marshal Quaife and the Chair had both been members at the same time, around two years had elapsed since the former's appointment had concluded and they had at all times had nothing other than an arms-length professional relationship; and
 - iv. perusal of the statements of reasons for preceding Tribunal decisions would clearly indicate that members of the Tribunal had not afforded to arguments advanced by either Brigadier Bornholt or Air Vice-Marshal Quaife any weight other than that warranted by the merits of those arguments.

13. Neither Mr Hartley nor any of his legal advisers raised any submission to the contrary.

Warrant Officer Wheatley's service

14. Warrant Officer Wheatley was drafted as a national serviceman into the Regular Army Special Reserve for a period of three years from 12 June 1956 and transferred to the Australian Regular Army for six years as an enlisted serviceman on 28 June 1958.⁷ He served until his death on active service in Vietnam on 13 November 1965. Warrant Officer Wheatley was

⁷ There are conflicting dates on Warrant Officer Wheatley's service records regarding his date of enlistment in the Australian Regular Army, with some documents citing 28 May 1958 and some citing 29 June 1958. The date of 28 June 1958 is the most consistently cited date.

deployed to Malaya from 30 August 1957 until 30 July 1959. He left Australia for service in Vietnam on 16 March 1965 and served with the Australian Army Training Team Vietnam.⁸

15. For his service, Warrant Officer Wheatley was awarded the following:

- (Imperial) Victoria Cross;
- Australian Active Service Medal 1945-1975 with Clasps 'MALAYA' and 'VIETNAM';
- General Service Medal 1918-62 with 'Malaya' Clasp;
- Vietnam Medal;
- Australian Defence Medal;
- United States of America Silver Star;
- National Order of the Republic of Vietnam, Knight's Badge ;
- Republic of Vietnam Military Merit Medal;
- Republic of Vietnam Cross of Gallantry with Palm;
- Republic of Vietnam Campaign Medal;
- Pingat Jasa Malaysia;
- United States of America Meritorious Unit Commendation; and
- Republic of Vietnam Cross of Gallantry with Palm Unit Citation.

Mr Hartley's application to the Tribunal

16. In his application to the Tribunal, Mr Hartley claimed that there had been a lack of recognition for Warrant Officer Wheatley's actions on 28 May and 18 August 1965 as the result of administrative oversight and refuted Defence's claim that they were part of a cumulative nomination for Warrant Officer Wheatley's Victoria Cross. He said:

Our position remains that the failure to recognise Warrant Officer Wheatley VC's actions on the 28th May 1965 and 18th August 1965 is an administrative oversight. Both actions stand alone and despite contemporaneous records and recommendations to the Australian chain of command at the time, they have never been recognised.

The actions of the 28th May 1965 and 18th August 1965 are well documented and subject to recommendations for awards for gallantry by both the American and Australian chain of command.

The Department of Defence assertion that the Australian chain of command somehow connived to include multiple acts in the Victoria Cross citation, after direct (although erroneous) instruction, is uniquely imaginative. There is no correspondence or recorded comment to that effect, and no evidence in National Archives or at the Australian War Memorial. Quite the reverse; instruction is given and accepted that the citation is to be

⁸ 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.

restricted to a single action. To suggest intent otherwise, is to question the chain of command and the integrity of those involved.

...Two quite separate actions have been clearly overlooked. Both were contemporaneously documented and deserved, in the opinion of the chain of command at the time, to have been recognised. The lack of recognition is an administrative oversight.⁹

The Defence report

17. The Defence report, prepared by Brigadier Bornholt, stated the following in relation to Warrant Officer Wheatley:

b. Warrant Officer Wheatley was nominated for the Victoria Cross by the Commanding Officer of the Australian Army Training Team Vietnam in late 1965 for three separate actions on 28 May, 18 August and 13 November 1965...

...

e. General Moore¹⁰ provided erroneous advice that the inclusion of the two actions on 28 May and 18 August in the citation were 'irrelevant to his final deed on 13/14 November 1965 and should be excluded', that 'the VC may only be awarded for one act of bravery' and in relation to the actual citation that 'if a build-up is necessary and it is not felt that it is in this case, it should be confined to two or three lines'.

...

f. ...The only change to the original citation agreed to by the Australian Army and Minister for the Army was the removal of the two paragraphs dealing with the actions on 28 May and 18 August 1965 in their entirety. They were not replaced by the recommended 'two or three lines'.

...

11. The applicant is suggesting that the deletion of the two supporting actions has caused some recognition to be 'missing'. But Warrant Officer Wheatley has received the ultimate recognition from a nomination process that quite deliberately included all of his gallant actions...¹¹

18. 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

⁹ Application for Review submitted by Mr Chris Hartley LVO, dated 2 February 2023.

¹⁰ General Sir Rodney Moore KCB, KCVO, CBE, DSO, ADC, was the United Kingdom Defence Service Secretary. He was provided a copy of Warrant Officer Wheatley's VC citation to review and vet.

¹¹ Defence report dated 18 April 2023.

agreed with the recommendations contained therein.¹² In relation to Warrant Officer Wheatley, Major Fardell's research report stated the following:

*21. **Research Results - 28 May 1965 WO2 Wheatley.** Throughout the period March – October 1965 WO2 Wheatley advised, trained and operated with the 1st BN of the 1st Regt, 1 Div of the Army of the Republic of Vietnam. On the 28 May 1965 he was involved in an incident....that resulted in him being recommended 'to be mentioned in dispatches (MID)*

...

25. The most probable conclusion is that as this action was included in the original AFW 3121 Recommendation for Honours or Award for the awarding of the Victoria Cross, the recommendation for the MID was cancelled by either the CO AATTV or COMD AAFV. Although no physical evidence has been found to support this, it is considered to be the most credible theory on why the recommendation was not progressed.

*26. **Research Results – 18 August 1965 WO2 Wheatley.** The actions of WO2 Wheatley on this date.....resulted in him being awarded the Silver Star by the United States.*

27. A search was conducted to determine if there was a AF-W 3121 Recommendation for Honours or Awards raised based on the recommendation by the US, unfortunately none was found.

...

33. There is no policy or precedent to indicate that the receiving of a foreign honour or award will automatically result in the consideration of or the awarding of an Imperial Honour or Award.

34. There was no evidence found to indicate that WO2 Wheatley was to be considered for a separate Imperial Honour or Award for his actions on 18 August 1965.

...

38. Conclusion. WO2 Wheatley was awarded the Victoria Cross based on the AF-W3121 Recommendation for Honours or Awards that was recommended by the CO AATTV, the COMD AAFV and, as the award required approval by Her Majesty, endorsed the ADJTGEN. What ensued in the 13 months after this recommendation was received does not change the fact that WO2 Wheatley was awarded the Victoria Cross based on that nomination.

¹² Ibid.

...

40. It can also be concluded that if the original AF-W 3121 Recommendation for Honours or Awards was submitted for approval by Her Majesty there is no evidence to indicate that it would not have been approved. If this was the case, it is highly probable that this application by Mr Hartley would never have been submitted.

41. It is also highly probable that the nomination for the MID (28 May 1965 action) and the recommendation by the US for an 'appropriate Australian Medal for heroism' (18 August 1965 action) were not progressed as they were included into the recommendation for the Victoria Cross.¹³

19. Major Fardell recommended that no further medallic recognition be considered for Warrant Officer Wheatley's actions on 28 May and 18 August 1965.¹⁴

Mr Hartley's comment on the Defence report

20. In his comments on the Defence report, Mr Hartley reasserted his view that the lack of recognition for Warrant Officer Wheatley's actions on 28 May and 18 August 1965 was an *administrative oversight*. Mr Hartley disputed Brigadier Bornholt's comment that Warrant Officer Wheatley's actions for all three events were part of a cumulative nomination for the Victoria Cross. He said:

Our summation is that the process followed by Australian Defence and Government, that resulted in the award of the first Victoria Cross to an Australian since World War 2, relied almost exclusively on the advice, erroneous or not, supplied by senior officers of the United Kingdom Armed Forces and advisors to Her Majesty The Queen .

It is of no surprise then that Australian Defence and Government followed the United Kingdom advice to the letter. As a direct consequence, what had started out as a three-part draft citation, covering three different dates, was almost immediately constrained, on advice, to a single date and series of actions on that date.

That change, regrettably, led to an administrative oversight and the abandonment of recognition for WO 'Dasher' Wheatley VC's gallantry on the 28th May and 18th August 1965.

...

There is an assertion in the Defence report that the use of the word 'acts' in the plural was somehow an acceptable semantic 'fudge' to incorporate the two other actions originally include (sic) in the draft citation but then abandoned. This is a furphy.¹⁵

¹³ Research report by Major Fardell as supplied with the Defence report, dated 9 March 2023.

¹⁴ Ibid.

¹⁵ Mr Hartley's comments on the Defence report, dated 21 July 2023.

The events of 28 May, 18 August and 13 November 1965

21. The facts concerning Warrant Officer Wheatley's actions on 13 November 1965 were not in issue in the present application and it was not necessary for the Tribunal to consider whether they warranted any additional recognition. As recorded in the citation for the award of the Victoria Cross by the Queen in 1966, they can be summarised as follows:

On 13th November 1965 at approximately 1300 hours, a Vietnamese Civil Irregular Defence Group company commenced a search and destroy operation in the Tra Bong valley, 15 kilometres 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 it 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 re-fused, 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 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.

Warrant Officer Wheatley displayed magnificent courage in the face of an overwhelming Viet Cong force which was later estimated at more than a company. He had the clear choice of abandoning a wounded comrade and saving himself by escaping through the dense timber or of staying with Warrant Officer Swanton and thereby facing certain death. He deliberately chose the latter course. His acts of heroism determination and unflinching loyalty in the face of the enemy will always stand as examples of the true meaning of valour.¹⁶

¹⁶ Supplement to the London Gazette No 44198 dated 15 December 1966 page 13567.

22. Instead, the present application raised two separate issues of relevance to the events of 28 May and 18 August 1965:

- a) whether those events were recognised by the 1966 award of the Victoria Cross, as claimed by Brigadier Bornholt; and
- b) if not, whether they now warrant additional medallic recognition and, if so, at what level.

23. It was thus important for the Tribunal to examine in some detail the nature of those events.

Warrant Officer Wheatley's actions – 28 May 1965

24. On 13 September 1965, two months prior to Warrant Officer Wheatley's death, a Recommendation for Honours and Awards was prepared and signed by the then Commanding Officer of the AATTV, Lieutenant Colonel AV Preece MVO, and the Commander of Australian Army Forces in Vietnam, Brigadier OD Jackson OBE.¹⁷ It proposed the award of an MID to Warrant Officer Wheatley for the events of 28 May 1965 which it described in the following terms:

On 28 May 1965 Warrant Officer Wheatley was accompanying the 1st Battalion, 1st Regiment of the 1st Division, Army of the Republic of Vietnam, as an advisor. The 1st Battalion was taking part in an attack against elements of an enemy battalion trapped near Van Van hamlet in Qang Tri Province. As the enemy position was attacked simultaneously from the west by an Army of the Republic of Vietnam infantry Battalion and from the south by an Army of the Republic of Vietnam elements supported by armoured personnel carriers, Warrant Officer Wheatley accompanied the Command Post of the 1st Battalion to a blocking position north of Van Van Hamlet.

Very soon after moving into position, the Command Post was subjected to intense small arms and automatic weapons fire from enemy emplacements at the northern edge of the hamlet. As the attack from the south progressed the enemy fire was joined by that of the .50 calibre machine guns of the armoured personnel carriers, which were firing directly into the Command Post position from the south. Members of the Command Post were forced to take cover in the slight defilade provided by a road bed which ran perpendicular to the direction of the incoming fire. A Vietnamese woman and three small children also took cover near the road.

As the fire increased in intensity the woman and the children became terrified. One of the children, a girl about three years old, broke away from her mother and ran, crying and screaming towards the road. Warrant Officer Wheatley, with complete

¹⁷ Form AF-W 3121 Recommendation for Honours or Awards, Warrant Officer Class 2 Kevin Arthur Wheatley Recommendation for MID dated 13 September 1965.

disregard for his own safety and fully exposing himself to the heavy fire from the south, leaping to his feet and ran to overtake the child. He scooped the child in his arms, and shielding her with his body, returned to the cover of the road bed.

*Warrant Officer Wheatley's heroic action in saving the life of this child made a profound impression on his Vietnamese and American counterparts and is undoubtedly an act in the highest Australian tradition of courage.*¹⁸

25. It appears that this recommendation was not further advanced and that it was probably regarded as being overtaken when the events of 28 May were included in the draft *Text of Citation, Award of VC (Posthumous) to WO2 K.A. Wheatley*, which stated that:

28 May 1965 WO2 Wheatley - *On 28 May 1965, Warrant Officer Wheatley was an advisor with the 1st Battalion, 1st Regiment of the 1st Division of the Army of the Republic of Vietnam. Whilst taking part in an attack against elements on a trapped enemy battalion, a Vietnamese woman and three small children took cover near the Command Group of the Battalion, which was under heavy fire. As the fire increased in intensity the woman and the children became terrified. One of the children, a girl about three years of age, broke away from her mother and ran, crying and screaming, towards the road. WO2 Wheatley, with complete disregard for his own safety and fully exposing himself to fire from the enemy, leapt to his feet and ran to overtake the child. He seized the child in his arms, and shielding her with his body, retired to the cover of the road bed.*¹⁹

26. There is no mention of this event in the official history publication, *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*. Nor is there mention of the event of 18 August 1965. The publication only mentions Warrant Officer Wheatley through an illustration,²⁰ 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.*²¹

27. Additionally, the event is not mentioned in the Australian War Memorial publication, *The Team, Australian Army Advisers in Vietnam 1962-1972*, authored by Ian McNeill. [The

¹⁸ See also undated December 1966 document prepared by the AATV that records that Warrant Officer Wheatley was recommended for the award of the MID as a result of his efforts on 28 May, from file NAA:A1945, 133/3/30 and, an undated letter from Warrant Officer Wheatley to his sister provided by the applicant, in which Warrant Officer Wheatley stated that *I have been put in for a few decorations since I have been over here.*

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, page 95.

²⁰ 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.

²¹ Ibid, page 497.

publication does however list in detail the events of 13 November 1965, which led to the death of Warrant Officer Wheatley and his subsequent posthumous award of the Victoria Cross for Australia.]

28. The Australian War Memorial does however, elsewhere list the event as follows:

On 28 May, Wheatley was assisting ARVN²² troops in engaging 'elements of a trapped enemy battalion.' In the course of the action, a young girl ran terrified into the cross fire. With little regard for his own safety Wheatley ran after the child. Both were now fully exposed to enemy fire. Seizing her, he used his body as a shield and carried her to safety. This action, though not recognised through an award, was however included in an early draft of his later Victoria Cross (VC) citation.²³

29. No official documented eye-witness accounts of Warrant Officer Wheatley's actions on 28 May 1965 have been identified.

30. The biography *Dasher: The Kevin Wheatley VC Story*, written by Michael C. Madden, described the events leading up to Warrant Officer Wheatley's actions in saving the young girl in more graphic detail, noting that his company was inadvertently caught in the line of fire from the Army of the Republic of Vietnam soldiers who were shooting a 50-calibre machine gun at the Viet Cong. It stated that:

...Dasher helped Hahn, Captain Hougen and the other advisors set up the men of 1/1, behind a dirt embankment, beside a road on the end of the small village. As soon as they had effectively dug in, the VC battalion, still being pressed ever-southward by the ARVN, fell back, and started to scatter around the huts.

Dasher stood up at the front and started firing at the retreating enemy soldiers, who were totally taken off guard. The second ARVN company who had been pursuing the VC, trapped them from the other side of the hamlet....Dasher could see their fellow ARVN company on the far side of the village and swore, as he watched them set up a 50-calibre machine gun and start firing into the small village. Wheatley shouted to his men to get down, as a second ARVN 50-calibre machine gun also opened fire. All hell broke loose, as the rounds flew through the hamlet and fell directly into Wheatley's position.

...As he rose again, he saw that a terrified South-Vietnamese woman had become trapped, out in the open. She was obviously one of the unfortunate residents of the hamlet, who had not been able to get out in time and she had three small children with her.

²² Army of the Republic of Vietnam.

²³ [Victoria Cross : Warrant Officer Second Class K A Wheatley, Australian Army Training Team Vietnam | Australian War Memorial \(awm.gov.au\)](#), Australian War Memorial, accessed 1 June 2023.

The small girl, who had stopped in the road, directly between Dasher's men and the horrific batter behind her, covered her face with her little hands and started to scream. Bullets shrieked past her...Dozens of 50-calibre bullets ripped at the dirt road around the girl and she screamed and fled. Running as fast as her little legs would carry her, straight back into the village and towards the rattling machine guns.

The Australian jumped from cover, SLR in hand, and ran directly into the hail of bullets. He dashed across the battlefield as fast as he could, rounds zinging past his ears and tearing at the ground around his feet. He ignored all of it and ran the girl down, bending low to scoop her up in his arms. He dropped to his knees, folding himself around her and protecting her little body with his own, as hundreds of rounds rained down around him...

There was a brief break in the gunfire, so Dasher, slinging his SLR over one shoulder and holding the girl in his arms sprinted back towards cover. Bullets fell about him again but he, somehow made it back safely and, to his complete astonishment, the little girl was completely unharmed.²⁴

31. The Tribunal noted in passing that, throughout his book, Mr Madden did not cross-reference historical records for his descriptions of the events he purported to record and he inferred at page 4 that he had attributed words and thoughts to Warrant Officer Wheatley and others based on his expectations and inferences or the reports of unnamed sources, rather than established and documented fact.

Warrant Officer Wheatley's actions - 18 August 1965

32. The draft *Text of Citation, Award of VC (Posthumous) to WO2 K.A. Wheatley* provided the following in relation to the events of 18 August 2023:

18 August 1965 WO2 Wheatley – *On 18th August 1965, Warrant Officer Wheatley was the Assistant Advisor to the lead element of the 1st Battalion, 1st Regiment during an assault against strong enemy fire which over ran a Viet Cong Village. While the Viet Cong withdrew up a slope to the north, the ARVN troops stopped advancing and began to pick up the weapons and supplies the Viet Cong had left behind. While the advisor was urging the ARVN commander to pursue the Viet Cong, Warrant Officer Wheatley, with complete disregard for his own safety, started up the slope alone. As the advisor started up the slope after Warrant Officer Wheatley, the ARVN unit commander brought a company forward to pursue the enemy. One third of the way up the slope a squad of Viet Cong opened fire with automatic weapons. Numerous burst barely missed Warrant Officer Wheatley, who still in the*

²⁴ Madden M. (2021) *Dasher, the Kevin Wheatley VC Story*, (First Edition) Newport NSW, Big Sky Publishing, pages 82-83.

*lead, dived behind some rocks. Seconds later the volume of fire slackened and Warrant Officer Wheatley continued his charge up the hill. The Viet Cong threw hand grenades at the advancing troops and wounded six ARVN soldiers behind the still charging Warrant Officer Wheatley. As a result of Warrant Officer Wheatley's courageous example, the ARVN troops continued the assault and completely routed the Viet Cong.*²⁵

33. The Australian War Memorial lists the event as follows:

Another action which was featured in correspondence regarding his VC recommendation occurred on 18 August 1965. Wheatley was an assistant advisor in an assault on an enemy held village. When the village was taken the remaining enemy troops retreated up a nearby slope. Meanwhile ARVN troops had checked their advance to gather up discarded enemy equipment and supplies. Wheatley carried on up the slope alone for some distance before being supported by a company of ARVN which had been urged forward by another Australian advisor. Under heavy grenade and automatic fire, Wheatley, still in the lead, encouraged his troops to forward where they 'completely routed the Viet Cong.

*He was recommended for an 'appropriate Australian Medal for heroism' for his actions on 18 August by Lieutenant Colonel Clarence Bishop, Infantry Deputy Senior Advisor, but no action was apparently taken on this recommendation. The instances of 28 May and 18 August did not appear in the final draft of the VC citation either, on the advice of General Sir Rodney Moore from the British Ministry of Defence, who considered that Wheatley's final actions were sufficient justification for the awarding of his VC.*²⁶

34. Again, the event is listed in more graphic detail in Mr Madden's biography, *Dasher : The Kevin Wheatley VC Story*, in which he described how Warrant Officer Wheatley anticipated a counter attack from the VC following a successful ambush while on Operation Lam Son 90 with the ARVN 1st Division. The book stated:

...He quickly started to move around the perimeter, looking for any place from which the enemy might want to launch a counterattack. There was a steep ridgeline, above and behind the village, which Wheatley decided would be the most likely place. As he moved towards it, he spotted a group of black-pyjama-wearing men moving across the ridgeline.

Wheatley swore and called for Hahn, instructing the officer to organise a platoon....Rather than wasting time arguing with the officer Wheatley fixed his

²⁵ Draft Text of Citation, *Award of VC (Posthumous) to WO2 K.A. Wheatley*, NAA A1945, 133/3/30, p 95-96.

²⁶ Victoria Cross : Warrant Officer Second Class K A Wheatley, Australian Army Training Team Vietnam | Australian War Memorial (awm.gov.au), Australian War Memorial, accessed 1 June 2023.

bayonet to the front of his rifle and took off at a run. He sprinted up the ridgeline, SLR in hand. He knew that hesitating would allow the enemy time to set up and that would lead to disaster. Behind him, Jim Lowe had managed to convince Hahn to take the threat seriously and had taken off behind Dasher, with a group of about fifteen ARVN soldiers.

As Dasher neared to top (sic) of the ridge, he ran into a barrage of small arms fire. He could hear rounds zip past his head and the enemy started to lob grenades at him.

He continued to run at the enemy, through the maelstrom and soon saw that there were at least twenty Vietcong soldiers on top of the ridge. Continuing forward, Dasher began to fire his SLR....Jim Lowe and the ARVN soldiers followed behind, shooting past Wheatley and the enemy began to fall back. Dasher shot another enemy and three more suddenly rose from tall grass to his left, but Wheatley dropped two of them and Lowe killed the third, The Vietcong scattered, startled by the ferocity of the Australia's (sic) assault.

He finally reached the top of the ridge, panting hard and encountered another handful of men....Wheatley, who now had Lowe and his group of ARVN soldiers behind him, pushed them back into the jungle and killed those who were not fast enough to get out of the way.²⁷

35. Mr Madden went on to write that as Warrant Officer Wheatley was swapping out his magazines, another VC soldier rose from the long grass and aimed his weapon at Lieutenant Lowe and, knowing that he couldn't reload in time, Warrant Officer Wheatley leapt forward and smashed the butt of his rifle into the side of the VC soldier's head, killing him instantly and saving Lieutenant Lowe. Mr Madden went on to state:

On the afternoon of 18 August 1965, Warrant Officer Second Class Kevin Wheatley had managed to attack and route an entire platoon of Vietcong soldiers up hill. The enemy had held the upper ground and might have outnumbered him, as much as twenty to one, yet Dasher had prevailed and stopped what could have been a costly counterattack.²⁸

36. Mr Madden noted that after the event, Warrant Officer Wheatley was told he would be awarded the honours of Knight of the National Order of the Republic of Vietnam and the United States Silver Star. While not awarded at the time, both were ultimately provided to Warrant Officer Wheatley's family quite some time after his death.

²⁷ Madden M. (2021) *Dasher, the Kevin Wheatley VC Story*, (First Edition) Newport NSW, Big Sky Publishing, pages 97-98.

²⁸ Ibid, page 99.

37. Reliance on Mr Madden's account must however be tempered by the qualification noted at paragraph 31 above.

38. A documented eye-witness account of Warrant Officer Wheatley's actions on 18 August 1965 was provided by First Lieutenant James Lowe II of the United States Marine Corps who stated:

At 1300 on 18 August, WO2 Kevin A Wheatly²⁹ (sic) was the assistant advisor to the lead element of the 1st Battalion, 1st Regiment. The point discovered a Viet Cong village and as ARVN troops deployed the enemy about 50 strong opened fire. With Warrant Officer Wheatly up front, the ARVN troops assaulted through a hail of small arms fire and overran the village. While the Viet Cong withdrew up a slope to the north, the ARVN troops stopped advancing and began to pick up weapons and supplies the Viet Cong had left behind. While the advisor was urging the ARVN commander to pursue the Viet Cong, Warrant Officer Wheatly, with complete disregard for his own safety, started up the slope alone. As the advisor started up the slope after Wheatly, the ARVN unit commander brought a company forward to pursue the enemy. One third of the way up the slope a squad of Viet Cong opened fire with automatic weapons. Numerous bursts barely missed Warrant Officer Wheatly, who still in the lead, dived behind some rocks. Seconds later the volume of fire slackened and Warrant Officer Wheatly continued his charge up the hill. The Viet Cong threw hand grenades at the advancing troops and wounded six ARVN soldiers behind the still charging Wheatly. As a result of Warrant Officer Wheatly's courageous example, the ARVN troops continued the assault and completely routed the Viet Cong. Warrant Officer Wheatly's bravery was an inspiring example and in keeping with the highest traditions of military leadership.³⁰

39. Following the battle, the Infantry Deputy Senior Advisor, Lieutenant Colonel Clarence E. Bishop, of the 1st Infantry Division Advisory Detachment Advisor Team, AFO US forces, wrote to the Commander, Australian Army Training Team Vietnam highly recommending Warrant Officer Wheatley 'for an appropriate Australian medal for heroism as a result of action against the Viet Cong on 18 August 1965'.³¹ Notwithstanding that an AATV document dated 1 October 1965 stated that *No formal recommendation for an Australian award is proposed*,³² the events of 18 August were later included in the draft citation for the award of the Victoria Cross to Warrant Officer Wheatley signed by Lieutenant Colonel McNamara, Commanding Officer of the AATTV and Brigadier Jackson and dated 31 January 1966.

²⁹ Wheatley was consistently incorrectly spelt as 'Wheatly' throughout the statement.

³⁰ Statement from First Lieutenant Lowe, NAA A1945 133/3/30, page 61.

³¹ Letter, Lieutenant Colonel Clarence E. Bishop to Commander, AATTV, dated 22 September 1965, NAA A1945 133/3/30, pages 105-106.

³² Letter Captain Davis obo Brigadier Command Australian Army Force Vietnam to AHQ dated 1 October 1965. Wheatley-Army Honours and Awards-Award of VC Army Working file AWM119 573.

40. Additionally, there is evidence on a Department of Defence file, *Award of Victoria Cross Vietnam (W.O.2. K.A Wheatley)*, held in the National Archives of Australia, that others in the Department believed that Warrant Officer Wheatley's actions on 28 May and 18 August 1965 warranted recognition:

- a. Correspondence from a Department of Defence official³³ to the Deputy Secretary of the Army advised that, in their view, the actions of Warrant Officer Wheatley on 18 August 1965 could have been made more of in the proposed Victoria Cross citation and *would certainly have merited a DCM and possibly a Victoria Cross.*³⁴
- b. Correspondence from the Head of Australian Joint Services Staff at Australia House in London, Major General F. Hassett CBE DSO MVO, to the High Commissioner for Australia stated that *the original citation contained a description of two prior incidents, each of themselves worthy of a gallantry award, but those were deleted from the final citation finally submitted on UK advice, that the final incident in itself was sufficient to warrant the award of a VC.*³⁵

Tribunal Consideration

41. As previously noted, Warrant Officer Wheatley was posthumously recognised by award of the Imperial Victoria Cross with the citation making specific reference to his actions on 13 November 1965. The questions raised by the present application to the Tribunal were:

- a. whether that award was also made in recognition of his actions on 28 May and 18 August 1965, as contended by Defence in the decision under review and again in the Defence report; and
- b. if not, whether the actions of 28 May and 18 August 1965 warrant further recognition and, if so, by what honour in the Australian system of Defence honours and awards.

42. At the hearing on 8 November 2023, Air Vice-Marshal Quaife advised that Defence stood by the decision and reasoning of Brigadier Bornholt with one minor exception – that it was not now maintained that the three events in question were ‘cumulative’. Accordingly, in the following passages, the Tribunal has focused primarily on the arguments in the form enunciated in Brigadier Bornholt's letter of 28 November 2022 and in the Defence report.

³³ This official was likely Mr J.J. Corrigan, Secretary of the Defence Committee.

³⁴ Correspondence from Department of Defence official to Deputy Secretary of the Army, NAA A1945 133/3/30, page 80.

³⁵ Correspondence Major General Hassett to High Commissioner for Australia dated 9 November 1966. NAA A1945 133/3/30, pages 16-17.

Existing recognition

43. Throughout the Defence report, Brigadier Bornholt referred to the Imperial Victoria Cross as a ‘gallantry’ award and sought to analyse both Warrant Officer Wheatley’s actions on each of 28 May, 18 August and 13 November 1965 and the subsequent consideration of them culminating in the award of the Victoria Cross in terms of ‘gallantry’, using that term at least 20 times. At the outset, it is relevant to note that, strictly speaking, the Imperial Victoria Cross was not a ‘gallantry’ award. That term is not used in the Royal Warrant creating the award. Rather, the Warrant refers to ‘bravery’, ‘valour’, ‘self-sacrifice’ and ‘devotion to duty’³⁶. [In contrast, the eligibility criteria for the Victoria Cross for Australia do refer to ‘gallantry’.]

44. The Tribunal did not raise this issue to suggest that Brigadier Bornholt’s analysis was thereby necessarily in error. While that point might conceivably be taken in court proceedings testing the validity of submissions made by legal counsel, the Tribunal considered that such standards are inappropriate in merits review proceedings such as the present. Rather, the Tribunal was prepared to assume that Brigadier Bornholt simply used the term ‘gallantry’ as a collective descriptor to cover each of the terms ‘bravery’, ‘valour’, ‘self-sacrifice’ and ‘devotion to duty’.

45. Nevertheless, the distinction was not without relevance for two reasons:

- a. Brigadier Bornholt’s arguments about the scope and effect of the award of the Imperial Victoria Cross must be tested by reference to the precise terms of the Warrant governing its grant; and
- b. if the Tribunal concluded that the Victoria Cross that was awarded did not recognise the events of 28 May and 18 August 1965, it must consider whether those events warrant any other recognition under the Australian system of honours and awards which includes not only the Victoria Cross for Australia but also a specific and separate suite of “gallantry” awards.

46. In relation to the first of these points, in the Defence report Brigadier Bornholt said that *The Victoria Cross was awarded to Warrant Officer Wheatley for his gallantry. This is not ‘gallantry on a particular day’ or ‘gallantry in a particular event’ but rather recognition of the recipient’s personal attribute of gallantry.*³⁷ The Tribunal understood this to imply that the award was for his quality or characteristic of gallantry and therefore a recognition of each and every act of gallantry that had been performed by Warrant Officer Wheatley, whether or not reference was made to it in the citation accompanying the award.

³⁶ UK Special Army Orders No 68 dated 13 October 1961, published by the War Office, Royal Warrant for the Victoria Cross. NAA A1945 133/3/30 pages 20-21.

³⁷ Defence report dated 18 April 2023.

47. The Tribunal considered that Brigadier Bornholt's contention that Warrant Officer Wheatley was awarded the Victoria Cross for his quality or characteristic of gallantry rather than for his actions on any particular day did not sit comfortably with the terms of the Royal Warrant that established the Imperial Victoria Cross that was awarded to Warrant Officer Wheatley. That warrant provided that:

*It is ordained that the Cross shall only be awarded for most conspicuous bravery or some daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.*³⁸

48. This terminology clearly evinces a focus on particular acts rather than mere possession of a characteristic. That focus is more particularly reinforced by the later provision of the Royal Warrant that specified that:

*It is ordained that if any recipient of the Cross shall again perform such an act of bravery as would have made him or her eligible to receive the Cross, such further act of bravery shall be recorded by a Bar to be attached to the riband by which the Cross is suspended, and for every such additional act of bravery, an additional Bar shall be added, and any such Bar or Bars may be awarded posthumously...*³⁹

49. Bravery, valour, self-sacrifice and devotion to duty, like musical harmony, can only be demonstrated by action. Unlike silence, such qualities are not demonstrated by inaction. Were it otherwise, it would be impossible to discern the 'gallant' soldier from the inactive soldier.

50. Accordingly, the Tribunal concluded that this contention by Brigadier Bornholt misconstrued the essential terminology of the Royal Warrant. The Tribunal was thus not prepared to accept that the conferral of the Victoria Cross on Warrant Officer Wheatley recognised only his characterisation as gallant or, alternatively, that it recognised each and any act of gallantry he may have performed, whether or not they were expressly or implicitly referred to in the accompanying citation. Rather, the Tribunal considered that the award of the Imperial Victoria Cross recognised only those acts specified (directly or by necessary implication) by the Sovereign in the relevant citation.

51. In the reviewable decision, Brigadier Bornholt dismissed Mr Hartley's claim that failure to recognise Warrant Officer Wheatley for the events of 28 May and 18 August 1965 was *a matter of administrative oversight* because *he was recognised by the Australian chain of command for 'acts' of heroism.*⁴⁰

52. In the Defence report Brigadier Bornholt put this argument even more strongly when he said:

³⁸ UK Special Army Orders No 68 dated 13 October 1961, published by the War Office, Royal Warrant for the Victoria Cross. NAA A1945 133/3/30, pages 20-21.

³⁹ Ibid.

⁴⁰ Application for Review submitted by Mr Chris Hartley LVO, dated 2 February 2023.

In Warrant Officer Wheatley's case, he was recognised by his peers and superiors as being an exceptionally gallant soldier. They had seen this attribute on a number of occasions and chose to seek recognition of that singular attribute by citing three occasions where his gallantry was evident (in the literal sense of providing evidence). The nomination and citation were seeking recognition of his gallantry – not recognition of three events or 'occasions' of gallantry. ... The application was a success and Warrant Officer Wheatley was recognised as a gallant soldier ... The Nomination Officer and Recommending Officer achieved what they desired – that Warrant Officer Wheatley be recognised for his gallantry by the award of the Victoria Cross.⁴¹

53. In the Tribunal's view however, this analysis misconstrued the nature of the process for award of the Victoria Cross. That award is made in exercise of the sole discretion of the Sovereign. What those who put forward a nomination for consideration by the Sovereign hoped to achieve and how they viewed the outcome of that consideration are not determinative of the scope and meaning of the award made by the Sovereign. The key issue is what the Sovereign decided, as evidenced by the award under the relevant Royal Warrant and the reasoning contained in the accompanying citation.

54. In the reviewable decision and in the Defence report, Brigadier Bornholt expressed the view that Warrant Officer Wheatley had been awarded the Victoria Cross in recognition of *gallantry* displayed in three actions on 28 May 1965, 18 August 1965 and 13 November 1965 notwithstanding that the citation that accompanied the award of the Victoria Cross made reference only to the latter of those actions. He said that:

To retrospectively commence to separate out multiple acts for one individual would create an unsustainable precedent and threaten the integrity of the honours and awards system⁴²

and

in relation to the notion that we should contemplate separating individual actions out of historical citations for honours considerations, it is my view that to do so would be a departure from the history of gallantry recognition. This has the potential to damage the integrity of the system by shifting focus from the recognition of an individual's gallantry to recognition of discrete actions.⁴³

⁴¹ Defence report, dated 18 April 2023.

⁴² Application for Review submitted by Mr Chris Hartley LVO, dated 2 February 2023.

⁴³ Defence report, dated 18 April 2023.

55. The Tribunal agreed with the proposition that it would be inappropriate to confer separate and additional honours on an individual where they had already been recognised by an honour awarded for the same service.

56. However, whether that proposition had any relevance in the present matter depended upon whether or not Warrant Officer Wheatley had already been recognised for the actions or service for which Mr Hartley sought additional recognition through the award of one or more additional honours.

57. There is no doubt that it was the intention and desire of the nominating officer, Lieutenant Colonel McNamara, and the recommending officer, Brigadier Jackson, that Warrant Officer Wheatley should receive the Victoria Cross⁴⁴ in recognition of his gallantry as demonstrated by the three actions to which reference was made in the draft citation they authorised.⁴⁵

58. But their intention and desire is not determinative of what aspects of the service of Warrant Officer Wheatley the award of the Victoria Cross by the Sovereign was intended to and did in fact recognise. Brigadier Bornholt's view that their intention and desire was determinative may well have derived from his belief that *the honours and awards system is subjective with responsibility and accountability vested in the commanders on the ground*.⁴⁶ While decisions on defence honours undoubtedly call for many subjective judgements, it is completely incorrect to assert that responsibility and accountability for reaching those decisions vests in commanders on the ground. In the particular case of the Imperial Victoria Cross awarded to Warrant Officer Wheatley, responsibility and accountability vested in the Prime Minister, the Governor-General and the Sovereign. Commanders on the ground and all those other personnel who had a role in elevating the nomination up to the Prime Minister had nothing more than an advisory role.

59. It was thus more pertinent to note the intention and desire of the Prime Minister (and the Governor-General) in putting forward the matter for consideration by the Sovereign because what they sought to achieve was of far greater relevance than what the Nominating Officer and the Recommending Officer intended.

60. Correspondence between these parties and their advisers discloses the following:

- a. On 15 February 1966 the then Minister for the Army, the Hon Malcolm Fraser, wrote to the then Minister for Defence, the Hon Allan Fairhall, strongly supporting the recommendation of the Commander of the Australian Army Force in Vietnam that Warrant Officer Wheatley be awarded the Victoria Cross *in recognition of his gallantry as described in the attached citation and*

⁴⁴ Form AF-W 3121 Recommendation for Honours and Awards Warrant Officer Class 2 Kevin Arthur Wheatley, dated 31 December 1965. NAA A1945, 133/3/30, page 93.

⁴⁵ Defence report dated 18 April 2023 - NAA A1945 133/3/30, page 42.

⁴⁶ Defence report dated 18 April 2023.

statements.⁴⁷ It appears from the disparate files available to the Tribunal that the attachments comprised:

- i. the Recommendation for Honours and Awards form signed by Lieutenant Colonel McNamara and Brigadier Jackson⁴⁸
 - ii. the draft citation text authorised by them, referencing the events of each of 28 May, 18 August and 13 November 1965⁴⁹
 - iii. a statement by Captain Fazekas dated 14 November 1965 and witnessed by US Staff Sergeant Theodore Sershen⁵⁰
 - iv. the separate statement by Staff Sergeant Sershen⁵¹
 - v. the statement by CIDG⁵² medical aidman Private Vo Trong Chan, dated 15 November 1965⁵³
 - vi. the statement by CIDG Soldier Private Dinh Do, dated 15 November 1965⁵⁴
 - vii. the letter dated 22 September 1965 from Lieutenant Colonel Bishop⁵⁵
 - viii. the undated statement by First Lieutenant Lowe⁵⁶
- b. On 28 February 1966, an officer of the Department of Defence wrote to a Deputy Secretary of the Department raising issues about Minister Fraser's nomination of Warrant Officer Wheatley which, it was said, was *based mainly on the attempt to save Warrant Officer Swanton*. The Minute said *This attempt did not and could not help the action in which Wheatley was engaged. In fact, in attempting to save Swanton, Warrant Officer Wheatley threw away his rifle and radio set and left himself unable to call for help and practically defenceless against the Viet Cong, whom he knew were closing in. This could have been a matter for disciplinary action had he lived*. The Minute then said *His action on the 18th August, 1965, which I feel could have been made more of in this citation, would certainly have merited a D.C.M. and possibly a Victoria Cross*. The author did not recommend querying Minister Fraser's nomination but urged that inquiries be made to ascertain whether it would be opposed or queried by

⁴⁷ Letter, Minister Fraser to Minister Fairhall, dated 15 February 1966. NAA A1945 133/3/30, page 92.

⁴⁸ Form AF-W 3121 Recommendation for Honours and Awards Warrant Officer Class 2 Kevin Arthur Wheatley, Victoria Cross, dated 31 December 1965. NAA A1945, 133/3/30, page 93.

⁴⁹ Text of citation of award of VC (Posthumous) for Warrant Officer Class 2 Kevin Arthur Wheatley. NAA A1945 133/3/30.

⁵⁰ Statement by Captain Fazekas, dated 14 November 1965. NAA A1945 133/3/30, page 97.

⁵¹ Statement by Staff Sergeant Theodore F Shershen, USA Special Forces. NAA A1945 133/3/30, page 101. see also undated statements on AWM:119 573

⁵² Civilian Irregular Defence Group.

⁵³ Statement by Private Vo Trong Chan CIDG Medical Aidman, dated 15 November 1965. NAA A1945, 133/3/30, page 102.

⁵⁴ Statement by Private Dinh Do, CIDG Soldier, dated 15 November 1965. NAA A1945, 133/3/30, page 103.

⁵⁵ Letter recommendation for an award by US Lieutenant Colonel Bishop, dated 22 September 1965. NAA A1945, 133/3/30, page 104.

⁵⁶ Statement by First Lieutenant Lowe, NAA A1945, 133/3/30, page 106.

Her Majesty if it were put forward.⁵⁷

- c. On 8 March 1966, the Secretary of the Department of Defence provided advice to Minister Fairhall in relation to Minister Fraser's letter of 15 February 1966. He noted that the draft citation referenced three separate acts of bravery, and that two of those related specifically to the saving or attempted saving of life. He said that it was doubtful if Warrant Officer Wheatley's actions on 18 August would qualify for the award of the Victoria Cross. While he considered that the events of 13 November *would appear to be appropriate for the award*, he noted that instructions had been laid down in the First World War that the Victoria Cross would be given only for acts of conspicuous gallantry which were materially conducive to the gaining of a victory. He said that there was therefore *an element of doubt* about whether the Victoria Cross was appropriate in Warrant Officer Wheatley's case. He recommended that the Minister ask Minister Fraser for an assurance that the high standards for that award were met.⁵⁸
- d. On 9 March 1966, Minister Fairhall wrote to Minister Fraser. He noted that the draft citation for Warrant Officer Wheatley was based mostly on his selfless act in trying to save his comrade. He said that he was informed that instructions issued in the First World War and followed in the Second World War laid down that the Victoria Cross would only be awarded for those acts of conspicuous gallantry which were materially conducive to the gaining of a victory. He said that he could not be confident in recommending to the Prime Minister that a nomination of Warrant Officer Wheatley be advanced unless Minister Fraser could cite other cases where the Victoria Cross has been awarded mainly for attempting to save life.⁵⁹
- e. On 29 March 1966 Minister Fraser wrote to Minister Fairhall in response to his letter of 9 March 1966. He suggested that the proposition that the Victoria Cross could not be awarded for saving life alone was applicable only to members of the Australian Army Medical Services, and cited six cases in which he claimed the Victoria Cross had been awarded to personnel not members of that Service for saving lives. He noted that the Royal Warrant referred expressly to self-sacrifice and again sought Minister Fairhall's concurrence to the recommendation in favour of Warrant Officer Wheatley.⁶⁰
- f. In response the Department of Defence provided advice to Minister Fairhall about Minister Fraser's letter of 29 March. It concluded that the information provided by Minister Fraser was not a sufficient basis to vary the practice that

⁵⁷ Minute from the Department of Defence to the Deputy Secretary (Army), dated 28 February 1966. NAA A1945, 133/3/30, page 86.

⁵⁸ Minute from the Secretary of the Department of Defence to the Minister, dated 8 March 1966. NAA A1945, 133/3/30 pages 82-83.

⁵⁹ Letter Minister Fairhall to Minister Fraser dated 9 March 1966. NAA A1945 133/3/30 page 81.

⁶⁰ Letter Minister Fraser to Minister Fairhall dated 29 March 1966. NAA A1945 133/3/30 page 79-80.

had been followed in respect of award of the Victoria Cross to members of the Australian Army since an order issued in September 1966 which qualified the conditions governing the award. This advice did not contemplate justifying the Victoria Cross for Warrant Officer Wheatley by reference to events other than those that resulted in his death.⁶¹

- g. On 21 April 1966 Minister Fairhall advised Minister Fraser that, while he agreed that Warrant Officer Wheatley's attempt to save his dying comrade constituted an act of supreme self-sacrifice, an order had been issued by *the appropriate authorities* in 1916 which qualified the application of the Royal Warrant and that, since that date, no Victoria Cross had been made to a member of the Australian Army *for the saving of life alone*. He said that if this was the case, *the standards for award of our highest decoration should not be varied*.⁶² This letter clearly referenced the events of 13 November 1965. No reference was made to the events of 28 May and 18 August 1965.
- h. On 29 April 1966 an officer of the Prime Minister's Department provided a draft semi-official letter to the Official Secretary, London, seeking guidance on whether the proposed recommendation and citation for the Victoria Cross for Warrant Officer Wheatley would be likely to be approved.⁶³ This draft explained that it was understood that instructions had been issued in 1916 that the Victoria Cross *would only be awarded for those acts of conspicuous gallantry which were materially conducive to the gaining of a victory, and that instances of gallantry in saving life, of however fine a nature, would not be considered*. The draft thus implied a reference only to the events of 13 November and not to those of 28 May or 18 August.
- i. On 28 June 1966 a letter was sent to Major General Hassett, Head of the Australian Joint Services Staff in London, asking that he make discreet inquiries at a high level in the Ministry of Defence about a possible nomination of Warrant Officer Wheatley for award of the Victoria Cross. While stating that *There is no question that the late W.O. Wheatley was a gallant and courageous soldier*, the Minister for Defence wanted to be certain that the standards for award of the Victoria Cross were fully observed before making a recommendation to the Prime Minister. Major General Hassett was asked to clarify in particular *whether Britain still follows the 1916 ruling as Australia has done*.⁶⁴
- j. On 29 July 1966 General Sir Rodney Moore, the Defence Services Secretary, advised Major-General Hassett that *the experts* had looked at the draft citation and that the award of the Victoria Cross to Warrant Officer Wheatley *merits consideration* but that the actions of 28 May and 18 August were *irrelevant* and

⁶¹ Minute Department of Defence advice to Minister Fairhall undated. NAA A1945 133/3/30 page 76.

⁶² Letter Minister Fairhall to Minister Fraser dated 21 April 1966. NAA A1945 133/3/30 page 75.

⁶³ Draft semi-official letter from Mr JJ Corrigan, Prime Minister and Cabinet to the Official Secretary, London dated 29 April 1966. NAA A1945 133/3/30 pages 73-74.

⁶⁴ Letter to Major General Hassett, dated 28 June 1966. NAA A1945 133/3/30 page 70.

should be excluded from the citation. He stated that *The V.C. may only be awarded for one act of bravery*.⁶⁵

- k. On 3 August 1966 Major General Hassett wrote to the Department of Defence.⁶⁶ He advised that the asserted order of 1916 qualifying the conditions in the Royal Warrant could not be substantiated, and that he had obtained written advice from General Sir Rodney Moore about how the matter should be progressed. He recommended that Sir Rodney's suggested changes to the citation be made.
- l. On 23 September 1966 the Secretary to the Department of Defence advised Minister Fairhall that the draft citation had been amended to adopt the suggestions made by General Sir Rodney Moore.⁶⁷
- m. On 27 September 1966 Minister Fairhall advised Minister Fraser that he was now satisfied that the criteria for the Victoria Cross had been met and that he had therefore forwarded the recommendation to the Prime Minister.⁶⁸
- n. On the same day, Minister Fairhall wrote to Prime Minister Holt supporting the recommendation for award of the Victoria Cross to Warrant Officer Wheatley *for gallantry in sacrificing his own life in an unsuccessful attempt to rescue a wounded comrade in an action against the Viet Cong*.⁶⁹ In so doing, he advised the Prime Minister that investigation of the matter had involved *an unofficial advance sounding of the panel of officer who advise Her Majesty on standards for the Victoria Cross*.
- o. On 18 October 1966 Prime Minister Holt wrote to the Governor-General endorsing the recommendation of Minister Fairhall and asking that the approval of her Majesty be sought. In so doing he stated that *The award would be in recognition of his gallantry in sacrificing his own life in an unsuccessful attempt to rescue a wounded comrade in an action against the Viet Cong on 13th November 1965*.⁷⁰
- p. On the same day the Governor-General wrote to the Secretary of State for Commonwealth Affairs asking that the papers be placed before Her Majesty. He stated that the award was proposed in recognition of Warrant Officer Wheatley's outstanding gallantry in *sacrificing his own life in an unsuccessful attempt to rescue a wounded comrade in an action against the Viet Cong on*

⁶⁵ Letter General Sir Rodney Moore to Major General Hassett, dated 29 July 1966. NAA A1945 133/3/30 page 49.

⁶⁶ Letter Major General Hassett to Mr Leng Department of Defence, dated 3 August 1966. NAA A1945 133/3/30 page 46.

⁶⁷ Minute Secretary Department of Defence to Minister Fairhall dated 23 September 1966. NAA A1945 133/3/30 page 39.

⁶⁸ Letter Minister Fairhall to Minister Fraser. NAA A1945 133/3/30 page 37.

⁶⁹ Letter Minister Fairhall to Prime Minister Holt. NAA A1945 133/3/30 page 38.

⁷⁰ Letter Prime Minister Holt to the Governor-General. NAA A1945 133/3/30 page 70.

13th November 1965.⁷¹ The papers to which he referred were the amended draft citation and supporting statements by Captain Fazekas and by two members of the Vietnam Combat Reconnaissance Platoon, all of which related only to the events of 13 November.

- q. Also on the same day the Governor-General advised the Prime Minister that he had forwarded the papers to London *for Her Majesty's pleasure with my endorsement for this award in recognition of Warrant Officer Wheatley's self sacrifice*.⁷²

61. Accordingly, by the time that the Prime Minister (and the Governor-General) recommended Warrant Officer Wheatley for recognition by award of the Victoria Cross, the intentions of the Nominating Officer, the Recommending Officer and Minister Fraser had clearly been set aside. The Government's recommendation was based squarely and solely on recognition for the events of 13 November 1965. Brigadier Bornholt's assertion in the decision under review that *Warrant Officer Wheatley was nominated for the Victoria Cross for three separate actions cumulatively, and the nomination was supported at all levels within the Army and Government at the time*⁷³ was palpably incorrect.

62. Following submission of the Australian Government's nomination, the papers available to the Tribunal indicate that:

- a. on 9 November 1966 Major General Hassett wrote to the High Commissioner reporting that he had been informally advised that the Commonwealth Office would be recommending and that it was likely that Her Majesty would approve the award of the Victoria Cross to Warrant Officer Wheatley. In that Minute he stated that it was the events of 13 November *which culminated in the loss of Warrant Officer Wheatley's life and the subsequent recommendation for the posthumous award*;⁷⁴
- b. on 15 November 1966 Sir Martin Charteris, then Assistant Private Secretary to the Sovereign, wrote to Sir Murray Tyrrell, then Official Secretary to the Governor-General, advising that the Queen had approved the award of the Victoria Cross to Warrant Officer Wheatley for his gallantry in Vietnam, but that he had been instructed by Her Majesty to raise two particular points about the wording of the citation. These related to Warrant Officer Wheatley discarding his rifle and his use of grenades – both occurrences on 13 November. It was stated that amending the draft citation in these regards *should leave no doubt in anyone's mind that his action was of the exceptional quality required for a Victoria Cross rather than for a Military Medal: the award made to Fazeka*

⁷¹ Letter Governor-General Casey to Secretary of State for Commonwealth Affairs dated 18 October 1966. Officer of the Governor-General file – Victoria Cross (Posthumous) Warrant Officer Class 2 Kevin Arthur Wheatley, NAA A2880 5/5/21, page 23.

⁷² Letter Governor-General to Prime Minister Holt. NAA A2880 5/5/21, page 20.

⁷³ Letter Brigadier Bornholt to Mr Hartley dated 28 November 2022, included with Mr Hartley's Application for Review.

⁷⁴ Letter Major General Hassett to High Commissioner for Australia. NAA A1945 133/3/30 page 14-15.

[sic].⁷⁵ Captain Fazekas was awarded the Military Cross for his actions on 13 November 1965; and

- c. subsequently the citation was amended to accommodate the points made by Her Majesty and the award of the Victoria Cross to Warrant Officer Wheatley was officially announced in the London Gazette on 15 December 1966, with the final citation referring only to the events of 13 November 1965.⁷⁶

63. During the course of this prolonged consideration, the citation of Warrant Officer Wheatley was progressively amended as follows:

- a. the first draft attached to the nomination form dated 31 December 1965, prepared for the signature of Lieutenant Colonel McNamara and Brigadier Jackson, referred only to the events of 13 November 1965;⁷⁷
- b. that same nomination form later had attached to it a draft citation which had been revised to add a new second paragraph that stated that Warrant Officer Wheatley's posting to the AATV in Vietnam *has been distinguished by meritorious and gallant service* followed by two further paragraphs summarising the actions of 28 May and 18 August before referring to the events of 13 November 1965;⁷⁸
- c. the draft citation proposed by Minister Fraser to Minister Fairhall was in the same terms, as was the draft citation forwarded to London for advice as to the prospects of success;
- d. the draft citation submitted to Prime Minister Holt by Minister Fairhall deleted the paragraphs referring to the actions of 28 May and 18 August 1966 as recommended by General Sir Rodney Moore; this draft was forwarded by the Prime Minister to the Governor General and by him for consideration by the Queen; and
- e. the final citation, amended to reflect the comments made by the Queen, deleted reference to Warrant Officer Wheatley discarding his rifle and added the statement that both Warrant Officer Wheatley and Warrant Officer Swanton *had died of gunshot wounds*.⁷⁹

64. While the intentions and desires of all those involved in bringing the matter to the attention of the Sovereign, including the Prime Minister and the Governor-General, may be of interest, they are of course not determinative. This is for the simple reason that, as already

⁷⁵ Letter Sir Martin Charteris to Sir Murray Tyrell. NAA A2880 5/5/21 pages 14-15.

⁷⁶ Supplement to the London Gazette No 44198 dated 15 December 1966 page 13567. WOII K A Wheatley - Award of VC - AWM119 573 page 1.

⁷⁷ Major Fardell's report attached to the Defence report Attachment C (extracts)

⁷⁸ Wheatley – Army – Honours & Awards – Award of VC working file. AWM119573.

⁷⁹ Supplement to the London Gazette No 44198 dated 15 December 1966 page 13567. WOII K A Wheatley - Award of VC - AWM119 573 page 1.

noted, the award of the Victoria Cross is a matter entirely for the discretion of the Sovereign. It is what the Sovereign sought to achieve that is the key issue.

65. In seeking to ascertain what the Sovereign sought to achieve, the principal evidence must of course lie in the terms of the final citation. Previous draft iterations and what the authors of them intended cannot countermand the final citation. Because the final citation refers only to the events of 13 November 1965, it cannot be asserted that the Sovereign intended that the award she decided to make was to recognise anything other than the gallantry displayed by Warrant Officer Wheatley on that occasion. There is nothing in the documentary evidence to suggest that Her Majesty would even have been aware of the prior examples of Warrant Officer Wheatley's gallantry claimed to have been exhibited on 28 May and 18 August 1965. Indeed, the evidence suggests that, if those events had been drawn to her attention, she would have been advised by General Sir Rodney Moore that those actions were 'irrelevant' as that was the view he had expressed to Major-General Hassett when asked to review the original draft citation.⁸⁰

66. General Sir Rodney Moore's advice that *The V.C. may only be awarded for one act of bravery* was wrong. [In fairness to him, it should be noted that he was simply repeating the advice provided to him by British officials]⁸¹. There are many examples of cases in which the citations approved by the Sovereign (both before and after the award to Warrant Officer Wheatley) make it clear that the Imperial Victoria Cross has been awarded for multiple acts of bravery. These include the 1941 award to Lieutenant Arthur Roden Cutler,⁸² the 1967 award to Major Peter John Badcoe,⁸³ and the 1969 award to Warrant Officer Class 2 Rayene Stewart Simpson.⁸⁴ But the fact that General Sir Rodney Moore's advice was wrong does not mean that the terms of the citation finally approved by the Sovereign can be taken to refer to facts and circumstances that are not referred to in it either expressly or by necessary implication.

67. In this latter regard Brigadier Bornholt asserted⁸⁵ that the use of the plural in the phrase *acts of heroism, determination and unflinching loyalty* in both the original draft citation and the final citation should be read as covering each of the three actions. In the Tribunal's view, that assertion was unsustainable. It effectively sought to put words into the final citation that are not there and to attribute to the Sovereign an intention to recognise events of which there is no evidence that she had any awareness, or alternatively which she would likely have been advised were irrelevant.

68. It was apparent to the Tribunal that the plural *acts* was fully apposite to describe various deeds of Warrant Officer Wheatley on 13 November alone, and did not give rise to any necessary implication of a reference to other dates. On that day he performed multiple acts that demonstrated the qualities to which the citation referred. He not only stayed with Warrant

⁸⁰ Letter General Sir Rodney Moore to Major General Hassett, dated 29 July 1966. NAA A1945 133/3/30 page 49.

⁸¹ Minute UK Military Secretary to Defence Services Secretary dated 27 July 1966. WO373/141/30.

⁸² Second Supplement to the London Gazette No 35630 dated 28 November 1941, page 6825.

⁸³ Second Supplement to the London Gazette No 35630 dated 13 October 1967, page 11273.

⁸⁴ Form AF-W3121 Recommendation for Honours and Awards, Warrant Officer Class 2 Rayene Stewart Simpson. File Office of the Military Secretary – Honours & Awards Working file AWM119 609 Part 1.

⁸⁵ Letter Brigadier Bornholt, AM (Retd) to Mr Hartley LVO dated 28 November 2022, included with Mr Hartley's Application for Review.

Officer Swanton in the ultimate act of self-sacrifice, but he also ensured that Private Dinh Do and Medical Aidman Private Vo Trong Chan were able to move to a position of safety rather than requiring them to stay with him in an endeavour to protect Warrant Officer Swanton, and he continued to attack the enemy until he had exhausted his rifle ammunition and grenades.

69. The Research Report prepared by Major Fardell and dated 20 September 2022 details some of the history of the consideration given to recognition of Warrant Officer Wheatley's actions on 28 May, 18 August and 13 November 1965. It included the following:

38 WO2 Wheatley was awarded the Victoria Cross based on the AF-W 3121 Recommendation for Honours or Awards that was recommended by the CO AATTV. The COMD AAFV and, as the award required approval by Her Majesty, endorsed the ADSJT-GEN. What ensued in the 13 months after this recommendation does not change the fact that WO2 Wheatley was awarded the Victoria Cross based on that nomination. The advice provided by GEN Sir Rodney Moore also does not change this fact.

39 The deliberation and document changes that occurred at Ministerial Level is regrettable but appears to have been rectified for subsequent recipients and is based on the fact that the recommendations for the Victoria Cross for MAJ Badcoe and WO2 Simpson included multiple acts of gallantry'⁸⁶

70. This argument was not dissimilar to that advanced by Brigadier Bornholt in both the reviewable decision and the Defence report but, in the view of the Tribunal, was unsustainable. It was of course the nomination, recommendation and endorsement of the Army chain of command that set in train the consideration of Warrant Officer Wheatley for award of the Victoria Cross. But it was the recommendations of the Prime Minister (and the Governor-General) that put the matter before Her Majesty and it was her decision that finally determined the award. Those determinative actions were clearly and expressly based solely on the events of 13 November 1965. The previous intentions and desires of others subordinate in the chain had by then been rendered irrelevant.

71. Having regard to all of the above analysis, the Tribunal concluded that the award of the Victoria Cross to Warrant Officer Wheatley recognised only his actions on 13 November 1965 and did not involve any recognition of his service on either of the earlier dates of 28 May and 18 August 1965.

Further recognition

72. Having reached the above conclusion, the Tribunal next gave consideration of what recognition, if any, should now be recommended for posthumous award to Warrant Officer Wheatley in respect of his action on each of 28 May and 18 August 1965.

⁸⁶ See Major Fardell's report, p.8.

73. At the outset the Tribunal dismissed the possibility that the citation for the Victoria Cross might simply be amended to include the events of 28 May and 18 August in order to redress the deleterious impact of the incorrect advice of General Sir Rodney Moore. It is certain that the Australian Government does not have any legal capacity to apply a ‘slip rule’ or similar for that purpose (and, indeed, there may be a question as to whether the present Sovereign could amend a citation approved by the previous Sovereign).

74. Similarly, the Tribunal dismissed the possibility that the Australian Government might seek the award of an additional bar or bars to the imperial Victoria Cross that was awarded to Warrant Officer Wheatley. The longstanding position of successive Australian Governments is that no further nominations will be made for imperial honours and awards.

75. Accordingly, if the adverse impact of the incorrect advice of General Sir Rodney Moore is to be redressed, this must be done within the Australian system of honours and awards.

76. In the reviewable decision and in the Defence report, Brigadier Bornholt clearly accepted that Warrant Officer Wheatley’s actions on 28 May and 18 August were acts of gallantry and heroism, and he certainly argued that they were recognised by the award of the Victoria Cross.

77. However, the role of the Tribunal is to form its own view in exercise of its independent judgement as to the correct or preferable decision as to recognition.

78. It was thus incumbent on the Tribunal to consider whether or not it should recommend that the events of 28 May and 18 August should (individually or together) be recommended for recognition by award of the Victoria Cross for Australia or any other Australian honour.

79. A number of theoretical options could be contemplated:

- a. A Victoria Cross for Australia could be considered for all of the three events of 25 May, 18 August and 13 November 1965 – but this would involve a double recognition of the events of 13 November;
- b. A Victoria Cross for Australia could be considered for the combination of the events of 28 May and 18 August, or for one or the other of them – this would require that such events be deemed to meet the eligibility criteria for such an award;
- c. If either or both of those events were not deemed to meet those eligibility criteria, an alternative honour within the Australian system could be considered – the options would appear to lie within either the Distinguished Service or Gallantry suites of Australian honours; and
- d. If both events were deemed to meet the eligibility criteria for any one Australian honour, the further option would arise of whether the two in combination were to receive the one award or whether they should be separately be recognised by

a medal and a bar.

80. It is clear that those in the contemporaneous chain of command believed that Warrant Officer Wheatley's actions on 28 May and 18 August were worthy of recognition by the Victoria Cross because they saw fit to refer to them in the second draft citation. However, it is not clear whether they formed that judgement about the events on each of those days individually or only when viewed in combination with the events of 13 November 1965. While Brigadier Bornholt asserted that the original nomination was *for three separate actions cumulatively*,⁸⁷ this appears to be unsupported by the evidence and that claim was not maintained by Air Vice-Marshal Quaife at the hearing. The initial draft nomination was for the events of 13 November only.⁸⁸ It was only later that the nomination at command level was amended to add in the events of 28 May and 18 August. And it may have been intended that those newly added events were to be reflected in the newly added sentence recording that Warrant Officer Wheatley's posting in Vietnam was *distinguished by meritorious and gallant service*⁸⁹ which might be thought to suggest that they were regarded as acts of gallantry falling short of the higher criteria required for the Imperial Victoria Cross.

81. The Tribunal considered that it was important to recognise that each of the three events of 28 May, 18 August and 13 November were significantly different from each other.

82. On 13 November 1965 Warrant Officer Wheatley made the ultimate sacrifice in an endeavour to protect his comrade Warrant Officer Swanton, despite advice from the medic that Swanton would not survive. His actions on that occasion have clearly been recognised by the award of the Victoria Cross, and the Tribunal considered, with respect, that that was fully justifiable.

83. On 18 August 1965 Warrant Officer Wheatley placed his own life at risk to lead by example ARVN soldiers, to whom he was an adviser, to persist with their action against Viet Cong troops when they were apparently otherwise minded to desist from further action. In so doing, he clearly advanced the military objective of victory against the enemy.

84. On 28 May 1965 Warrant Officer Wheatley again placed his own life at risk, but not to advance the prospects of a victory over the enemy in the battle then being waged but to save the life of a civilian child. This was a humanitarian or compassionate deed, rather than a strategic military manoeuvre (although it may of course have been of value in winning support from the civilian community for continued resistance against Viet Cong forces).

85. In the matter of *Hulse and the Department of Defence re: Norden* DHAAT 11 (20 July 2022) the Tribunal discussed at length the eligibility criteria for the Victoria Cross for Australia. It concluded that, read in the context of the Letters Patent, the eligibility criteria set out in the Victoria Cross Regulations require at least one of the following:

⁸⁷ Letter Brigadier Bornholt to Mr Hartley dated 28 November 2022, included with Mr Hartley's Application for Review.

⁸⁸ Major Fardell's report attached to the Defence report Attachment C (extracts).

⁸⁹ Wheatley – Army – Honours & Awards – Award of VC working file. AWM:119 573.

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

86. The Tribunal in that case then went on to consider the meaning of the various adjectival qualifiers used in that listing – most conspicuous, daring, pre-eminent and extreme.

87. The present Tribunal applied that same analysis in considering the actions of Warrant Officer Wheatley on 28 May and 18 August 1965. It concluded that, notwithstanding the highly commendable nature of his actions on each of those days, they each or together in combination fell somewhat short of the paramount or superlative qualities required by those adjectival qualifiers. It accordingly considered that it would not be appropriate to recommend that Warrant Officer Wheatley be considered for the award of a Victoria Cross for Australia in respect of either date or for both in combination.

88. In this regard it is noted that Mr Hartley did not argue at the hearing that the events of 28 May or 18 August 1965 should now be recognised by award of the Victoria Cross for Australia. While Air Vice-Marshal Quaife did state at the hearing that the Defence position was that those events were appropriate for inclusion in the citation for the Victoria Cross that was eventually awarded, he similarly did not go so far as to suggest that they should now be recognised by the Victoria Cross for Australia.

89. The Tribunal thus considered whether or not Warrant Officer Wheatley's actions on either or both of those dates warranted recognition by any alternative award in the Australian system of defence honours and awards.

90. In this regard, given the warlike service involved, there are two possibilities.

91. The Distinguished Service Decorations comprise:

- (a) the Distinguished Service Cross for distinguished command and leadership in action;
- (b) the Distinguished Service Medal for distinguished leadership in action; and
- (c) the Commendation for Distinguished Service for distinguished performance of duties in warlike operations.

92. In the view of the Tribunal:

- a. Warrant Officer Wheatley's actions on 28 May 1965 would at least qualify for a Commendation for Distinguished Service (but not a Distinguished Service Medal or a Distinguished Service Cross as the act of saving the girl was not in its view a display of leadership as such); and
- b. his actions on 18 August 1965 would at least qualify for a Distinguished Service Medal (noting that he provided leadership to the Vietnamese troops he was advising but in respect of which he was not in a position of command, thus rendering the Distinguished Service Cross inapplicable).

93. Alternative to the Distinguished Service Decorations are the Gallantry Decorations. The *Commonwealth of Australia Gazette* (CAG) No S25 dated 4 February 1991 recorded the creation of the Star of Gallantry, the Medal for Gallantry and the Commendation for Gallantry by Letters Patent. The eligibility criteria for these awards are set out in the *Gallantry Decorations Regulations 1991* (as amended in *CAG No. S420*, dated 6 November 1996).

94. The Gallantry Decorations Regulations set out the following eligibility criteria for the gallantry decorations 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.

(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.*⁹⁰

95. The Tribunal considered that, if Warrant Officer Wheatley's action on either or both of 28 May and 18 August 1965 met the eligibility criteria for a Gallantry Decoration, the award of such would be preferable to and more appropriate than the award of a Distinguished Service Decoration for which he might otherwise qualify.

⁹⁰ *Amendment to Gallantry Decorations Regulations, Commonwealth of Australia Gazette, No S420*, dated 6 November 1996.

96. The Tribunal thus considered whether Warrant Officer Wheatley's action on either or both of these days were such as to warrant a Gallantry Decoration.

97. In this regard, at the hearing Mr Hartley urged that the Tribunal should recommend the award of the Star of Gallantry, with the citation for that award to recognise the events of both dates (that is, one award rather than either two separate awards or one award and a bar). In doing so, however, he did not provide any reasoned argument as to why those events exceeded the eligibility criteria for either the Medal for Gallantry or the Commendation for Gallantry.

98. For its part, Defence declined to offer a view on what recognition would be appropriate for the events of 28 May and 18 August 1965 if they were the only significant events in the service of an ADF member. Air Vice-Marshal Quaife would not be drawn on this issue, other than to say that Defence regarded the actions on those dates as appropriately referenced in a Victoria Cross citation. The Tribunal found this submission to be of no effective assistance and to fall short of the Secretary's obligation to assist the Tribunal in relation to a review as set out in the Tribunal's Procedural Rules made under section 110XH of the *Defence Act 1903* and the model litigant principles attached to the Legal Service Directions issued by the Attorney-General under the *Judiciary Act 1903*. [At the same time, the Tribunal recognised that Air Vice-Marshal Quaife may have felt obliged not to depart from Brigadier Bornholt's position that the events on those dates had already been recognised by the award of the Victoria Cross.]

99. 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.

100. As already noted:

- a. the final citation for the Victoria Cross includes the general statement that Warrant Officer Wheatley's posting to the Australian Army Training Team

Vietnam *has been distinguished by meritorious and gallant service.*⁹¹ While that view cannot be interpreted as an assertion by the Sovereign that the events of 28 May and 18 August 1965 exhibited gallantry because there is no evidence that she was aware of them, it can certainly be taken as representing the view of the commanders in the field who inserted those words and of Defence Minister Fairhall who was clearly aware of the events of those dates and recommended to the Prime Minister that the citation containing those words be submitted to the Sovereign;

- b. on 13 September 1965 Lieutenant Colonel Preece and Brigadier Jackson signed a form that contained a recommendation that Warrant Officer Wheatley be awarded the Mention in Despatches for his actions on 28 May 1965;⁹²
- c. a 28 February 1966 Defence Minute stated that *His action on the 18th August, 1965, which I feel could have been made more of in this citation, would certainly have merited a D.C.M. and possibly a Victoria Cross;*⁹³
- d. on 8 March 1966 the Secretary of the Department said that it was doubtful if Warrant Officer Wheatley's actions on 18 August would qualify for the award of the Victoria Cross but did not offer a view on whether any other recognition would be warranted;⁹⁴
- e. the 28 June 1966 Defence letter to Major General Hassett, asking him to ascertain the British view on a possible award of a Victoria Cross, stated that *There is no question that the late W.O. Wheatley was a gallant and courageous soldier;*⁹⁵
- f. Major General F. Hassett, in writing to the High Commissioner for Australia, stated that *the original citation contained a description of two prior incidents, each of themselves worthy of a gallantry award;*⁹⁶
- g. Warrant Officer Wheatley was recommended for *an appropriate Australian Medal for heroism* for his actions on 18 August by Lieutenant Colonel Bishop, US Infantry Deputy Senior Advisor;⁹⁷
- h. First Lieutenant Lowe of the United States Marine Corps described Warrant Officer Wheatley's actions on 18 August 1965 as *bravery [which] was an*

⁹¹ Application for Honours to Chief of the Army from Mr Hartley on behalf of Wheatley, dated 22 May 2022.

⁹² Wheatley – Army – Honours & Awards – Award of VC working file. AWM11957.

⁹³ Minute Department of Defence to Deputy Secretary (Army) dated 28 February 1966. NAA A1945, 133/3/30, page 86.

⁹⁴ Minute Secretary Department of Defence to the Minister, dated 8 March 1966. NAA A1945, 133/3/30 pages 82-83.

⁹⁵ Letter to Major General Hassett, dated 28 June 1966. NAA A1945 133/3/30 page 70.

⁹⁶ Letter Major General Hassett to High Commissioner for Australia. NAA A1945 133/3/30 pages 14-15.

⁹⁷ Letter, Lieutenant Colonel Clarence E. Bishop to Commander, AATTV, dated 22 September 1965, NAA A1945 133/3/30, p 105-106.

*inspiring example and in keeping with the highest traditions of military leadership;*⁹⁸

- i. Brigadier Bornholt accepted in the Defence report that Warrant Officer Wheatley's action on each of 25 May, 18 August and 13 November were acts of gallantry; and
- j. while Air Vice-Marshal Quaife would not be drawn on what recognition the events on 28 May and 18 August would warrant on a stand-alone basis, he certainly did not suggest that they were not acts of gallantry.

101. Having regard to the undisputed descriptions of the factual circumstances surrounding the events of 28 May and 18 August and to the views of others as noted in the preceding paragraph, the Tribunal readily concluded that on each date Warrant Officer Wheatley had performed an act of gallantry by reference to the test adopted by the Tribunal in *Hanuszewicz and the Department of Defence re: Cameron*.

102. Having reached that conclusion, it was thus necessary for the Tribunal to consider whether those acts of gallantry were simply *acts of gallantry in action ... worthy of recognition*, or alternatively *acts of gallantry in action in hazardous circumstances*, or indeed *acts of great heroism or conspicuous gallantry in action in circumstances of great peril*.

103. The Tribunal was in no doubt that each was performed *in action*. Further, the Tribunal held no doubt that they were worthy of recognition. And in the view of the Tribunal it was apparent that in each case the situation was so dangerous for Warrant Officer Wheatley and the risk to his own life that he took was so great as to justify the conclusion that he undertook his actions on each date 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.

104. However, without in any way wishing to belittle the significance of Warrant Officer Wheatley's actions on each of 28 May and 18 August, 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* on those dates, 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 on those days were so far beyond *hazardous* as to involve *great peril*. While Warrant Officer Wheatley clearly put his own life on the line on each occasion and could have been killed in doing so, that is consistent with the prevailing circumstances being hazardous and does not by itself elevate them to a state of *great peril*.

105. Accordingly, the Tribunal concluded that Warrant Officer Wheatley's actions on 28 May and 18 August 1965, taken together, met the eligibility criteria for the Medal for Gallantry but did not meet the eligibility criteria for the Star of Gallantry. In reaching this conclusion, the Tribunal had regard to the citations for various other awards of the Star of Gallantry and the

⁹⁸ Statement from First Lieutenant Lowe, NAA A1945 133/3/30 p 61.

Medal for Gallantry and concluded that the circumstances of Warrant Officer Wheatley's actions on those dates were more comparable to those recognised by previous grants of the Medal for Gallantry than those recognised by the Star of Gallantry.

106. For completeness and in recognition the Defence honours are awarded in exercise of executive discretion rather than as a matter of entitlement where the eligibility criteria are met, the Tribunal noted that an examination of Warrant Officer Wheatley's service records did not identify any countervailing circumstance which might suggest he should not receive further medallic recognition.

107. Finally, the Tribunal noted that, if incorrect advice had not been provided, in all likelihood Warrant Officer Wheatley would have been awarded the Victoria Cross by reference to a citation describing his actions on each of 28 May, 18 August and 13 November 1965 and, in the Tribunal's view, he would not now be considered for any additional medallic recognition for any of those actions. While some might think that it would be inappropriate for him to now be recognised by both the Victoria Cross and a Medal for Gallantry when others had received a Victoria Cross for multiple comparable acts because incorrect advice had not been given in their case, the Tribunal considered that it would be unfair and inappropriate for Warrant Officer Wheatley and his family to continue to bear the burden of the incorrect advice that was given and which had the clear effect that his actions of 28 May and 18 August 1965 have not hitherto received the appropriate medallic recognition. The key purpose of defence honours and awards is to recognise appropriately eligible aspects of service, rather than to issue the physical accoutrements of recognition. Because the events of 28 May and 18 August have not hitherto received the recognition they warranted, the Tribunal considered that they should not now be denied that recognition or, incidentally, appropriate physical representation of it in the form of a Medal for Gallantry.

Tribunal Decision

108. In light of all of the above, that Tribunal decided to recommend to the Minister that the decision to not recommend Warrant Officer Wheatley for an Australian Gallantry Decoration be rejected and that Warrant Officer Wheatley should be now recommended for the Medal for Gallantry for his actions on 28 May and 18 August 1965 (as described in the draft citation authorised by Lieutenant Colonel McNamara and Brigadier Jackson).