



Australian Government

Defence Honours and Awards Appeals Tribunal

Conlon and the Department of Defence [2024] DHAAT 1 (11 April 2024)

File Number 2023/015

Re **Mr Rohan Conlon**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Stephen Skehill (Presiding Member)
Ms Karen Fryar AM
Air Commodore Anthony Grady AM (Retd)
Major Gary Mychael OAM CSM (Retd)
Air Vice-Marshal Tracy Smart AO (Retd)

Hearing Date 6 March 2024

Appearances Mr Rohan Conlon, Applicant

Ms Allison Augustine, Acting Director, Directorate of
Honours and Awards, Department of Defence

Group Captain Simon Braun, Director Honours and Awards,
Joint Operations Command, Department of Defence

DECISION

On 11 April 2024, the Tribunal decided to recommend to the Minister:

- (a) that he not accept the decision that Mr Rohan Conlon not be recommended for the Commendation for Distinguished Service for his actions on 9 August 2009; and
- (b) that he should instead recommend to the Governor-General that the citation for the Commendation for Distinguished Service already awarded to Mr Conlon should be amended (and republished in the Gazette if necessary) along the lines set out in these reasons to expressly recognise those actions.

CATCHWORDS

DEFENCE HONOUR – Commendation for Distinguished Service – Afghanistan - 2009 - combat engineers - combat first aid – Operation CRAM GHAR - previously recognised distinguished service

LEGISLATION

*Defence Act 1903 – Part VIIC – Sections 110T, 110V(1), 110VB(1), 110VB(6)
Defence Regulation 2016 Section 35*

Commonwealth of Australia Gazette No. S25 of 4 February 1991 – Letters Patent and Regulations for the Distinguished Service Decorations

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

Introduction

1. The Applicant, Mr Rohan Conlon, seeks review of a decision dated 6 July 2023 by the Chief of Joint Operations, Lieutenant General Greg Bilton AO CSC, to refuse to recommend him for the Commendation for Distinguished Service in recognition of his service in Afghanistan on 9 August 2009.

Decision under review

2. On 17 January 2022, Mr Conlon applied to the Directorate of Honours and Awards in the Department of Defence seeking recognition for his actions as a combat first aider on 7 July 2009 during Operation TUFANI BABAR and on 9 August 2009 during Operation CRAM GHAR by way of a (singular) Commendation for Distinguished Service.¹ On 6 July 2023, Lieutenant General Bilton wrote to Mr Conlon advising him that, while his actions on 7 July 2009 satisfied the eligibility criteria for the award of the Commendation for Distinguished Service, his actions on 9 August 2009 did not.² On 27 September 2023, Mr Conlon was recognised with a Commendation for Distinguished Service for his actions on 7 July 2009.

3. On 24 August 2023, Mr Conlon made application to the Tribunal seeking review of the above decision insofar as it related to his service on 9 August 2009. In doing so, Mr Conlon stated that it was his opinion that his actions on that day were worthy of a Commendation for Distinguished Service, but due to maladministration he was never suitably recognised.³

Tribunal jurisdiction

4. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence honour in response to an application.

5. Regulation 35 of the *Defence Regulation 2016* lists the defence honours that may be the subject of a reviewable decision. The Commendation for Distinguished Service is included in the defence honours listed in Regulation 35. Therefore, the Tribunal has jurisdiction to review decisions in relation to this defence honour.

¹ Letter, Mr Conlon to the Directorate of Honours and Awards, *Application for a review into eligibility for a Commendation for Distinguished Service – 8510788 – SGT Rohan Conlon*, undated.

² Letter, Lieutenant General Bilton to Sergeant Conlon, *Consideration for award of a Commendation for Distinguished Service*, dated 6 July 2023.

³ Application for Review, dated 24 August 2023.

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

Conduct of the review

7. In accordance with its Procedural Rules, on 30 August 2023 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Conlon's application for review. The Tribunal requested a merits-based assessment of Mr Conlon's actions against the eligibility criteria for the Commendation for Distinguished Service and a report on the material questions of fact and reasons for the decision to refuse the original application. The Tribunal also requested that the Secretary provide copies of documentation relied upon in reaching the decision and any other relevant documents.⁴

8. On 10 November 2023, the Director of Honours and Awards in the Department of Defence provided a submission on behalf of Defence.⁵ The Defence submission included several relevant documents, including a report of a merits-based assessment of Mr Conlon's actions on both of the above dates which was written by Defence's then Historical Honours Review Officer, Brigadier Mark Bornholt AM (Retd), on 29 May 2023.⁶

9. The Defence submission was forwarded to Mr Conlon for comment on 16 November 2023.⁷ Mr Conlon responded with his comments on 30 November 2023.⁸

10. Mr Conlon provided a significant number of additional documents to the Tribunal on 23 February 2024 and the Tribunal copied those to the Department of Defence.

11. The matter was heard by the Tribunal on 6 March 2024. At the hearing the Chair drew to Mr Conlon's attention that:

- a) Brigadier Bornholt was previously a member of the Tribunal, but his tenure as a member had concluded prior to the appointment of any of the panel assigned to the present review; and

⁴ Letter, Mr Stephen Skehill to Mr Greg Moriarty, *Review of recognition for Mr Rohan Conlon*, dated 30 August 2023.

⁵ Letter, Mr Ian Heldon to Mr Stephen Skehill, *Review of Recognition – 8510700 – Mr Rohan Conlon*, dated 10 November 2023.

⁶ Report, *Merits Based Assessment – Recognition of Sapper Rohan Conlon for his actions as a combat first aider on 7 July and 8 August 2009 in Afghanistan*.

⁷ Letter, Mr Jay Kopplemann to Mr Rohan Conlon, dated 16 November 2023.

⁸ Letter, Mr Rohan Conlon to Mr Jay Kopplemann, dated 30 November 2023.

- b) Major-General Mark Kelly AO DSC (Retd), who had been involved in the nomination of Sapper Barry for his actions alongside Mr Conlon on 7 July 2009, was a currently serving member of the Tribunal but none of the present panel members had discussed or would discuss Mr Conlon's application for review with him.

12. The Chair advised Mr Conlon that he had given consideration to whether or not either of those circumstances gave rise to a reasonably apprehended conflict of interest in relation to the present panel dealing with Mr Conlon's application, and had concluded that they did not. Mr Conlon raised no objection to the panel proceeding with the review.

13. After the hearing, Mr Conlon provided an additional submission setting out his views of the interpretation of the word 'distinguished' and attaching a copy of an Army publication in relation to Army First Aid. And he provided yet further documents between 22 and 28 March. Copies of those further documents were provided to Defence.

14. The Tribunal takes this opportunity to compliment and thank Mr Conlon for the various submissions and related documents he has provided to the Tribunal. It is clear that he has invested a great deal of thought and detailed research in generating these materials, and they have been of considerable benefit to the Tribunal. While the Tribunal did not agree with all of the propositions and arguments advanced by Mr Conlon (for the reasons discussed below), the Tribunal considered that he could have made no stronger argument in support of the outcome he sought.

Mr Conlon's service

15. Mr Conlon enlisted in the Australian Regular Army on 31 January 2006. On completion of his initial employment training, he was posted to the 3rd Combat Engineer Regiment as a Sapper, and deployed to Afghanistan between June 2009 and February 2010. In 2012, he was posted to the 20th Explosive Ordnance Disposal Squadron, 6th Engineer Support Regiment, as a Combat Engineer. In 2015 he was promoted to Corporal and completed the Explosive Ordnance Disposal Course, and in 2020 he was promoted to Sergeant. During his service, he performed the roles of Protected Mobility Vehicle Crewman, Explosive Ordnance Reconnaissance Technician, Team Second-in-Command and Team Leader.⁹

16. In addition to his 2009 deployment, he again deployed to Afghanistan in 2012 with Advisory Task Force 1 as the Protected Mobility Vehicle driver for an Explosive Ordnance Disposal (EOD) team. In 2018, he deployed to Iraq for six months as a trainer in Task Group Taji 7. In 2019, he deployed as an Explosive Ordnance Disposal Technician to the Solomon Islands on Operation RENDER SAFE. In 2021, he deployed

⁹ Letter, Mr Conlon to the Directorate of Honours and Awards, *Application for a review into eligibility for a Commendation for Distinguished Service – 8510788 – SGT Rohan Conlon*, undated.

on Operation ACCORDION, as the lead EOD technician in the Force Protection Reserve during the evacuation of the Australian Embassy in Afghanistan.

17. For his service, he has been recognised with the following:

- a) the Commendation for Distinguished Service;
- b) the Australian Active Service Medal with Clasp 'ICAT'
- c) the Afghanistan Medal
- d) the Australian Operational Service Medal – Greater Middle East Operations
- e) the Australian Operational Service Medal – Greater Middle East Operations 2
- f) the Defence Long Service Medal
- g) the Australian Defence Medal
- h) NATO Non Article 5 Medal with Clasp ISAF
- i) the Operational Service Badge.¹⁰

18. Mr Conlon was medically discharged from the Australian Defence Force on 26 July 2023.

19. This review concerns Mr Conlon's service on 9 August 2009 as a combat engineer posted to 3rd Combat Engineer Regiment as a high-risk searcher to Mentoring and Reconstruction Task Force 2 in Afghanistan in 2009. Relevant to this application, Mr Conlon was a qualified Combat Engineer and had completed High Risk Search Operations training in 2006 and Combat First Aid training in 2008.¹¹

20. While the review does not relate to the award of the Commendation for Distinguished Service that was made to Mr Conlon in respect of his service in Afghanistan on 7 July 2009 in response to the same application to Defence that led to the reviewable decision, for reasons that will later appear it is nevertheless relevant to record the terms of the citation for that award.

21. The short-form citation for his Commendation for Distinguished Service reads:

*For distinguished performance of duty whilst deployed on warlike operations as a Combat Engineer in Mentoring and Reconstruction Task Force 2 on Operation SLIPPER on 7 July 2009.*¹²

22. The full gazetted text of the citation is as follows:

For distinguished performance of duty whilst deployed on warlike operations as a Combat Engineer in Mentoring and Reconstruction Task Force 2 on Operation SLIPPER on 7 July 2009.

¹⁰ Letter, Mr Ian Heldon to Mr Stephen Skehill, *Review of Recognition – 8510700 – Mr Rohan Conlon*, dated 10 November 2023.

¹¹ Ibid.

¹² Ibid.

In 2009, Sergeant Rohan Paul Conlon, then a Sapper, was employed as an Explosives Ordnance Device Technician within 3rd Combat Engineer Regiment. He was deployed to Afghanistan and force assigned as a high-risk searcher within Mentoring and Reconstruction Task Force 2.

During Operation TUFANI BABAR, a battle-group level operation in the Baluchi Valley in Afghanistan, Sapper Conlon's section was supporting 1 Platoon, Combat Team - Alpha. On 7 July 2009, his section was leading 1 Platoon's advance north along Route 62, providing mobility support with dismounted route search. During the patrol, 3 Section was involved in a significant improvised explosive device strike which detonated under the front wheel stations of the Protected Mobility Vehicle. At the time of the strike, Sapper Conlon was dismounted and searching a vulnerable point in front of the lead vehicle. After the initial shock of the explosion, he immediately started to search back along the road towards the damaged Protected Mobility Vehicle. Searching back to the vehicle through clouds of dust was extremely difficult, dangerous and confusing. Metal strewn across the road made searching for secondary explosive devices particularly challenging. It was not possible to see inside the vehicle as the front windscreen was shattered, and the lack of response from his colleagues indicated immediate assistance was required.

Upon entering the Protected Mobility Vehicle it was evident that the Crew Commander and the Driver had sustained serious wounds. As a qualified Combat First Aider, without direction, Sapper Conlon immediately provided life-saving assistance to his wounded colleagues. Concurrently, he mentored a less experienced Combat First Aider, who was also treating the wounded. Despite having never cannulated a patient, Sapper Conlon successfully did so with the Crew Commander and commenced intravenous therapy treatment prior to the evacuation of the casualties. Under Sapper Conlon's direction, the wounded were stabilised until a casualty handover was conducted to an Advanced Medical Technician. After the wounded soldiers were evacuated from the vehicle, he established a casualty clearance point and continued to perform first aid. Sapper Conlon continued to treat the wounded until the Casualty Evacuation helicopter arrived and he then carried the casualties to the helicopter.

The actions taken by Sapper Conlon in providing first aid treatment and coordination in the Protected Mobility Vehicle and directing the evacuation processes whilst mentoring a less experienced soldier were exemplary. His actions in immediately attending to the welfare of the wounded soldiers of his section clearly demonstrated exceptional presence of mind in a high-pressure combat situation. His coordinating actions, both at the vehicle and at the

casualty clearance point, were superior to those expected of a soldier of his rank, experience and employment.

Sapper Conlon's distinguished performance of duty whilst deployed in Afghanistan with Mentoring and Reconstruction Task Force 2 are in keeping with the finest traditions of the Royal Australian Engineers, the Australian Army and the Australian Defence Force.

Eligibility criteria for the Distinguished Service Decorations

23. The Distinguished Service Decorations, being the Distinguished Service Cross, the Distinguished Service Medal and the Commendation for Distinguished Service, were established by Letters Patent on 15 January 1991, published in the *Commonwealth of Australia Gazette No S25* dated 4 February 1991, for the purpose of:

*'... according recognition to members of the Defence Force and certain other persons for distinguished command and leadership in action or distinguished leadership in action or distinguished performance of their duties in warlike operations.'*¹³

24. Award of the Decorations is governed by Regulations set out in a Schedule to the Letters Patent.

25. The words 'in action', described in the clause quoted above, were removed by amending Regulations published in the *Commonwealth of Australia Gazette No S18 Amendment of Distinguished Service Decorations*, dated 22 February 2012, and replaced by the words 'in warlike operations'. As a result conditions for the award of the Decorations are now set out in the amended Regulation 3 as follows:

3. (1) *The Distinguished Service Cross shall be awarded only for distinguished command and leadership in warlike operations;*
- (2) *The Distinguished Service Medal shall be awarded only for distinguished leadership in warlike operations;*
- (3) *The Commendation for Distinguished Service may be awarded for distinguished performance of duties in warlike operations.*¹⁴

¹³ *Commonwealth of Australia Gazette No S25* dated 4 February 1991.

¹⁴ *Commonwealth of Australia Gazette No S18* dated 22 February 2012.

Mr Conlon's application to Defence

26. In his application to Defence Mr Conlon stated that his actions on 7 July and 9 August 2009 *were worthy of recognition with a Commendation for Distinguished Service but due to maladministration (he) was never suitably recognised.*

27. Mr Conlon offered the following account in respect of his service on Operation CRAM GHAR:

Operation CRAM GHAR. *On 9 Aug 2009 our section, E51A, was attached to 1 Platoon moving from Sarab to COP Mashal to conduct operations in the Baluchi Valley. The convoy had stopped outside Chora in order to search a Vulnerable Point (VP) known as the 'Chora Crossing'. Sapper Rodda and Sapper Voss had moved forward with the infantry to secure the crossing and to conduct an isolation of the VP. The rest of the section was in the PMV in a vehicle hide with the rest of the convoy. At some point while waiting for the isolation to be completed there were two explosions in the dasht in the direction of Tarin Kowt.*

We received very little information at the time. It was reported on the radio that two American Kiowa helicopters flying near our convoy had seen some insurgents emplacing an IED and fired missiles at the insurgents. They had also seen one of the insurgents fleeing the area. Our section along with some of the PMVs and ASLAVs were tasked to move down Route 55, apprehend the fleeing insurgent and to search the area for the IED that was being emplaced.

We began driving back to Tarin Kowt along Route 55 and soon our PMV driver and crew commander spotted a male walking through the dasht who had also been seen dropping something. We stopped the male and then our section dismounted to detain him which was conducted by Sapper Ryan. At the same time we were detaining this individual it was reported that there were insurgents who were still alive. After placing the PUC into a PMV we continued driving to the engagement area to search a safe lane to the casualties so they could be treated by the medic as we suspected there was an IED near them.

The PMV stopped short of the scene so Corporal Pascoe, Sapper Barry and I could dismount and start searching towards the casualties. We were chosen to search as we were both Combat First Aid trained and would be able to start treating the casualties as soon as we had finished searching a safe lane. Sergeant Horton had told us that from their ASLAV they could see that two people were still alive. As we began searching towards the casualties you could see one of them writhing around on the ground. There was a male whose charred remains were still sitting on a motorbike that was now on its side. His arms were stuck in a raised position in the air that looked like he was still holding the handlebar, his intestines were hanging out of his abdomen and when we searched around the far side of the four insurgents you could see that half his face was missing. There was also a young male who was still alive. I assessed that he was 12 to 16 years old. He was lying on top of an older male who had a leg that was partially amputated and was dead.

As we got to the first male who was still alive Sapper Barry stopped searching and then began to start treating him with the medic Corporal Roberts. I continued searching around the casualties until we had cleared an area to safely work in. When we had confirmed that there was no IED in the immediate area I moved over to the young male who was still alive and began treating him. I was quickly joined by Lance Corporal Bromley who began helping me treat him. Later Sergeant Oltvanji, Corporal Pascoe and Corporal Roberts would assist with treating this casualty. While the medic was treating the other casualty I was required to direct Sergeant Oltvanji, Corporal Pascoe and Lance Corporal Bromley while also administering life-saving interventions. We tried our best to bandage the multiple fragmentation wounds that he had but he soon began to die. I recall standing at his feet looking into his eyes as he took his last breath. Lance Corporal Bromley then commenced CPR before he finally died.

After an extended delay the AME finally arrived and we placed the only survivor on the helicopter to be taken to the Role 2 Hospital at Tarin Kowt. While he was being loaded onto the AME helicopter Corporal Pascoe, Sapper Ryan and Sapper Gebert were searching a VP 20 – 30m up the road to see if there was an IED there but they would find nothing. Soon after the AME left the ANP arrived and took control of the scene. We then drove back to the “Chora Crossing” and finished searching it so the convoy could resume driving to COP Mashal.

I don't know what the American pilots had seen but our section never located any IED components, weapons or digging implements that day. Were those individuals insurgents or were they civilians? The gravity of this unanswered question is a burden that I live with every day.

On 9 Aug 2009 the performance of my duties as a Combat Engineer and Combat First Aider in warlike service was distinguished as they were superior in comparison to what's normally expected of a Sapper. The performance of my duties that I consider to be superior are as follows:

a. I was required to search a safe lane and the immediate area around the casualties for a possible IED. This task was made more difficult by the amount of fragmentation from the Hellfire missiles.

b. While the medic was treating the other casualty I was required to direct Sergeant Oltvanji, CPL Pascoe and LCPL Bromley while also administering life-saving interventions to my patient.

c. I demonstrated superior first aid skills by prolonging my patient's life for as long as I did despite his catastrophic injuries. The decision to prioritise the AME of PRI 3 Australian casualties over suspected enemy combatants is the reason my patient died at the scene.

d. At all times while performing my duties I remained calm, was compassionate and preserved the dignity of a suspected enemy

combatant, displaying maturity, professionalism and character well above what you would expect from a junior soldier.

28. Mr Conlon also submitted to Defence that the consideration of his service was subject to maladministration in that he had been informed by Corporal Pascoe that both Mr Conlon and Sapper Barry had been nominated for recognition but that someone in his chain of command had decided that they would not submit two nominations for the same incident. Mr Conlon argued that this constituted maladministration, in light of the removal of the 'quota' policy in 2008, and his view that his actions were equally worthy of recognition as those of Sapper Barry. It was not clear whether any such nomination of Mr Conlon was only for his actions on 7 July 2009 or also for his actions on 9 August. In any event, the question of whether or not there was any maladministration in the handling of any such nomination is strictly irrelevant to the question before the Tribunal – that is, whether or not his actions on 9 August 2009 meet the eligibility criteria for the Commendation for Distinguished Service.

29. Mr Conlon also made reference to the book *After the Blast: An Australian Officer in Iraq and Afghanistan, 2015*, written by Lieutenant Colonel Garth Callender, where it is claimed that Lieutenant Colonel Callender compiled a report into the incident, for which Mr Conlon was never interviewed, despite his being one of the first responders. Mr Conlon submitted that as a result, the incident was not fully investigated and the full circumstances were not brought before the chain of command.

30. In his application, Mr Conlon also offered to facilitate the delivery of helmet camera footage which he submitted was not completely made available to his chain of command, and offered the view that this material constituted compelling new evidence.

31. Relevant to his service on 9 August 2009, Mr Conlon provided the following statement from Warrant Officer Pascoe:

On 9th August 2009 we heard over the radio that BAM BAM, (which is an American attack helicopter call sign) had engaged some people believed to be insurgents placing in an IED located on a dirt road in the dasht, near Chora. My section happened to be the closest search team at the time and was task to clear to the target site and evaluate. We had been out on the ground for a significant period of time at this point of the deployment and had been in quite a few high stress situation, so members were beginning to burn out. Therefore, once we were on site a few of the section members preferred not to be the first responders on site.

SPR Conlon, who volunteered as the lead searcher and myself proceeded to clear a lane down to the individuals that had been contacted, we cleared the area around them so that first aid could be administered to the personnel that had been injured.

BAM BAM had fired two Hellfire thermobaric missiles at four suspected insurgents so it was a very graphic scene with two personnel still alive and calling out for assistance and two personnel who had been killed from the

impact. At the time we had been told that these personnel were insurgents placing an IED, we had to attempt to clear the whole area around them; this was proving to be difficult due to metal from the missiles as well as the motor bikes that had been hit. SPR Conlon preform his task as the lead searcher without question to a high standard in a very sensitive and high pressure environment, all while having the injured personnel screaming out for him to assist them. Once a lane was deemed to be clear SPR Conlon switch his main role on the spot, became the first CFA¹⁵ on target, proceeded to triage, and treat the two injured personnel. There was a young male that appeared to be in his teens and an adult male, both with multiple significant life threatening injuries, SPR Conlon assessed these injuries and started the treatment that was required. At the same time, I finished off clearing the rest of the area and gave permission for the medic and other personnel to move down and assist with first aid on the injured personnel.

SPR Conlon did not leave the injured personnel's side during the whole process assisting with the first aid requirements. Due to his efforts as well as others on the scene, we were able to stabilise one of the suspected insurgents for medical evacuation. At the same time the other search brick were conducting a clearance of the HLZ for medical evacuation of the stabilised person, unfortunately the other injured man died on the scene. Once the medical evacuation was completed SPR Gebert, SPR Ryan and myself conducted a search down the road and in the general area to try to find any IED componentry with no success.

On this day, SPR Conlon preformed his duty as both a searcher and CFA to the highest standard. Looking back now at this event and having a better understanding of the honours and awards system, I believe SPR Conlon's actions have not been fully recognised. While we were on deployment, we were just getting through everything day by day and these events were assessed to be part of the job, in hindsight I personally should have been more persistent and pushed for nomination for awards at the time.

The chain of command was informed about this event, but MRTF-2¹⁶ was an extremely busy deployment and SPR Conlon's actions on this day may have been lost in translation with the numerous reports being sent through. I do not know about any investigations happening into the event that took place on 09 August 2009, and myself as the leader of the first team on site was not interviewed. I did have helmet camera footage of the event, but I cannot remember whether the chain of command seen this or not.

I was SPR Conlon's section commander for approximately 7 months of the MRTF-2 deployment, during this time I relied heavily on his exemplary performance as a combat engineer sapper and so did the infantry call signs we were attach to throughout this deployment. His knowledge, actions and ability to

¹⁵ Combat First Aider

¹⁶ The second Mentoring and Reconstruction Task Force rotation

*perform under extreme pressure was well beyond the standard of a soldier in his position. He should be extremely proud of his service during this time.*¹⁷

32. Mr Conlon also provided the following statement from Sapper Barry:

I Platoon's engineer section (whom I was a part of along with SPR Conlon) was dismounted to provide security to search the Chora crossing. Whilst this was occurring an aerial patrol occurring in the area identified locals that they believed were emplacing an IED. They subsequently engaged these locals with Hellfire missiles resulting in combat team alpha 1 platoon being tasked with responding to the still living persons to place them under capture. Whilst this was occurring the ASLAV performed reconnaissance on the blast site and identified living but catastrophically injured persons present.

*The team dismounted and searched toward the injured whilst under the knowledge and threat that they had likely placed an IED. SPR Conlon, myself and the team after clearing the threat area identified 4 persons, 2 living, 2 deceased. SPR Conlon was combat first aid trained and whilst working with the company medic commenced first aid on the grievously wounded present. Whilst treating the patient who happened to be a minor, the patient bled out rapidly rendering SPR Conlon's efforts futile. The remaining survivor was stabilised and evacuated.*¹⁸

The reviewable decision

33. As noted above, on 6 July 2023 Lieutenant General Bilton wrote to Mr Conlon communicating the reviewable decision. In doing so, he stated that Mr Conlon's application had been thoroughly examined by his staff and considered by a Board of Officers. Following the Board consideration, it was decided to recommend Mr Conlon for the award of the Commendation for Distinguished service, but only in respect of his service on 7 July 2009. In respect of Mr Conlon's service on 9 August 2009, Lieutenant General Bilton stated:

*...I acknowledge the horrific circumstances of the incident. However, I do not consider your actions to be superior to someone of your rank and employment performing the duties you were trained and expected to undertake whilst deployed as a combat engineer and first aider in Afghanistan. Consequently your actions on this day do not meet the criteria for the award of the Commendation for Distinguished Service.*¹⁹

34. It is apparent that any Board of Officers consideration that was undertaken and that the decision by Lieutenant General Bilton was made in reliance on the merits

¹⁷ Statement, Warrant Officer Class 2 B.C. Pascoe, *Statement – For Rohan Conlon's actions on Mentoring Reconstruction Task Force 2*, undated.

¹⁸ Statement, Mr William Barry, dated 19 December 2022.

¹⁹ Letter, Lieutenant General Bilton to Sergeant Conlon, *Consideration for award of a Commendation for Distinguished Service*, dated 6 July 2023.

assessment undertaken by Brigadier Bornholt following receipt of Mr Conlon's initial application to Defence. The significance of that reliance is discussed further below.

Mr Conlon's application to the Tribunal

35. Mr Conlon gave the following reasons why he disagreed with the decision made by Lieutenant General Bilton regarding his service on 9 August 2009:

1. *I was not trained to use the F3 Minelab²⁰ that we were using in Afghanistan. I did not complete a formal course to obtain that proficiency until around 2015 when I commenced my Explosive Ordnance Disposal training. Prior to deploying to Afghanistan our Troop only had access to two F3 Minelabs and I did not operate it during pre-deployment training. The only training I received on how to operate the F3 Minelab was a "Soldier's Five" from the combat engineers from MRTF-1 when we arrived in Afghanistan.*
2. *Yes I was a trained Combat First Aider but the Summative Assessment for that course was on one casualty that only required one person to apply first aid. I was not trained to treat a casualty whilst simultaneously being required to direct other soldiers on what first aid interventions they needed to apply to the casualty.*
3. *At the time of the incident I was only a Sapper but I was required to lead a small team of other soldiers while treating one of the casualties. The size ranging from 2-4 soldiers and that included soldiers higher in rank to me. I did not receive training in how to lead a brick and a section until I completed the Junior Leaders Course in 2011.*
4. *CJOPS claims that my actions on that day were not "superior to someone of your rank and employment performing the duties you were trained and expected to undertake" but there were 1-2 soldiers who were trained CFAs per section in that force (Infantry platoon with cavalry, engineers, forward observers and other enablers in support. Approx 50 soldiers) and I estimate that there could have been up to 10 CFAs. However, I was one of only two soldiers that searched a safe route to and around the casualties. I was the first soldier to reach the casualties. I was also the only CFA that was required to lead the treatment of one of the casualties. My actions were demonstrable superior to the other soldiers with my training and rank that day and the performance of my duties was distinguished compared to every other Private on the ground that day.²¹*

²⁰ A metal/mine detector.

²¹ Application for Review, dated 24 August 2023.

The Defence report

36. The Defence report was provided under copy of a letter to the Tribunal from Mr Ian Heldon, Director Honours and Awards, signed on 10 November 2023. The report stated that, in response to Mr Conlon's application, Defence undertook a review of Mr Conlon's service records, available contemporaneous records of the actions and any recommendations in connection with his service in Afghanistan in 2009, and any other relevant material. The report confirmed that, having considered Mr Conlon's application and the other information and evidence in a merits-based assessment, Defence found that his actions on 9 August 2009 did not meet the conditions for the award of the Commendation for Distinguished Service, and the report went on to recommend that this decision should be affirmed by the Tribunal in the course of this review.

37. The report stated that in considering nominations for current serving Australian Defence Force Members for a Distinguished Service Decoration, the member's entire deployment or rotation is normally considered, rather than just actions in a single action or incident, but that a Commendation for Distinguished Service may be considered in relation to performance of duties in a singular action or incident.

38. The report also stated that a number of other factors are considered in reviewing recognition for an individual's performance; most notably evidence that their performance of duties was of a higher standard than others in similar circumstances. The report went on to state that this assessment is based on recommendations or comments from commanders at the time with visibility, and understanding, of that individual's performance within the operational context.

39. The Defence report stated that helmet camera footage supplied by Mr Conlon as part of his application had not been viewed in the process of making the reviewable decision.

40. The Defence report stated that following HQJOC research into Mr Conlon's actions, a merits-based assessment was conducted by Brigadier Bornholt. The report stated that a merits-based assessment and a draft decision brief were provided to CJOPS for consideration, and that CJOPS decided to accept the recommendation of the decision brief, which replicated the conclusions and recommendations of Brigadier Bornholt's assessment not to recommend Mr Conlon for the Commendation for Distinguished Service for his actions on 9 August 2009. The Defence report made no reference to any consideration by the Board of Officers referred to by Lieutenant General Bilton in the reviewable decision.

41. Brigadier Bornholt's report stated that HQJOC was unable to provide any evidence regarding the incident on (9) August 2009 and that, in undertaking his assessment, he only relied on material provided by Mr Conlon. Brigadier Bornholt's report also stated that as Mr Conlon's contention regarding maladministration had no bearing on the merits of his actions, Brigadier Bornholt disregarded those submissions.

42. Brigadier Bornholt's report stated that *due to the subjective nature of honours and awards, Defence does not define what constitutes distinguished performance of duties, preferring to rely on the judgment of the chain of command during the nomination approval process.* However, Brigadier Bornholt also stated that much had been written about relevant definitions by the Tribunal, that the Tribunal's position was that for service to be 'distinguished' an individual in their role or appointment would have successfully discharged duties which were 'additional or superior' to those normally pertaining to the individual's rank or appointment, and that it was against that definition that he considered whether Sapper Conlon's service was distinguished.

43. In respect of Mr Conlon's service on 9 August 2009, Brigadier Bornholt made the following findings:

a) *Clearance of a safe lane to the area of the casualties was a task that Sapper Conlon was qualified to perform and expected to do. This was not in my view superior to any other sapper trained to conduct high risk search or clearance.*

b) *Sapper Conlon's treatment of the casualty as a trained combat first aider was in my view to be expected, although I acknowledge that the age of the casualty and horrific nature of his injuries created an extremely confronting situation.*

c) *Sapper Conlon's decisions in relation to prioritising casualties was in my view expected of him and reflected his training as a combat first aider.*

44. Brigadier Bornholt went on to state that:

there is little doubt that Sapper Conlon's actions on (9) August 2009 were compassionate and dignified and performed in horrific circumstances, however they were not in my view additional and superior to those normally pertaining to his rank and employment. He did what was expected of him as a combat first aider and arguably what would have been done by anyone else placed in his situation with the same experience and training.²² (emphasis added)

45. It was, apparently, on these bases that Lieutenant General Bilton decided to not recommend Mr Conlon for any recognition for his service on 9 August 2009.

Mr Conlon's comments on the Defence report

46. On 7 December 2023, under cover of a letter signed on 30 November 2023, Mr Conlon provided extensive comments on the Defence report. Mr Conlon summarised his commentary by stating:

²² Report, *Merits Based Assessment – Recognition of Sapper Rohan Conlon for his actions as a combat first aider on 7 July and 8 August 2009 in Afghanistan.*

*The decision of Defence to not recommend me for the Commendation for Distinguished Service for my actions on 9 August 2009 is unsafe. It is based on flawed research, a flawed merits-based assessment, a Defence culture of cover up and an incorrect interpretation of the Distinguished Service Decorations Regulations. I recommend that this decision be rejected.*²³

47. In respect of Defence's research, Mr Conlon outlined his concern that in response to his application, Defence could only find three documents that it considered were of relevance to his application, those being documents in relation to the Commendation for Distinguished Service awarded to Sapper Barry for his actions on 7 July 2009. Mr Conlon pointed to Defence's obligation to preserve its records and requested that Defence produce any documentation relating to the events of 9 August 2009.

48. In respect of Defence's merits based assessment, Mr Conlon outlined a number of concerns, notably:

- a) the Afghan casualty treated by Mr Conlon on 9 August 2009 was incorrectly described by Defence as 'a young man' rather than as a minor;
- b) the casualty did not die '*shortly after first aid was commenced*', rather, Mr Conlon managed to keep him alive for a long time considering his catastrophic injuries;
- c) Defence's failure to consider the helmet camera footage during its assessment;
- d) that Defence failed to address his contention that:
 - i. at all times while performing my duties I remained calm, was compassionate and preserved the dignity of the suspected enemy combatant, displaying maturity, professionalism and character well above what you would expect from a junior soldier.*
- e) he disputed Defence's proposition that anyone else, with the same experience and training, would arguably have done the same thing. On the contrary, Mr Conlon argued that there were others on that day with the same experience and training who did not perform as he did. Mr Conlon submitted that after he and the medic began treating the casualties, the other soldiers followed their lead and began to work to the best of their abilities to help save the wounded;
- f) Mr Conlon made reference to the Afghanistan Inquiry Report and specified three examples where Special Operations Task Group soldiers, in similar situations, who he argued were more experienced and trained than he was, were accused of unlawfully killing the wounded; and

²³ Letter, Mr Rohan Conlon to Mr Jay Kopplemann, dated 30 November 2023.

- g) Mr Conlon also raised some concerns with the assessment of his service on 7 July 2009, for which he was ultimately recognised.

49. In respect of a ‘*Defence culture of cover up*’, Mr Conlon set out what he submitted were multiple examples of the conduct of individuals after the incident of 9 August 2009 that pointed to a consciousness of guilt and claimed that it was disingenuous of Defence to deny that the sensitive nature of the incident had not been a factor that influenced the decision making regarding the awarding of Defence honours. In doing so, Mr Conlon set out what he believed were a number of instances of possible or potential unlawful conduct.

50. In respect of Defence’s interpretation of the Distinguished Service Decorations Regulations, Mr Conlon submitted that Defence used an incorrect and unnecessarily onerous test for eligibility for the Commendation for Distinguished Service. Mr Conlon referred to Defence’s merit based assessment which said:

... Much has been written about definitions by the Defence Honours and Awards Appeals Tribunal and I am satisfied that the Tribunal position that for service to be ‘distinguished’ an individual in their role or appointment would have successfully discharged duties which were additional or superior to those normally pertaining to the individual’s rank and employment. It is against this definition that I am considering whether Sapper Conlon’s performance of duties was distinguished. There is of course no dispute that he was on warlike operations when the actions he has cited were performed.

51. Mr Conlon pointed to the dictionary definition of ‘duty’ and submitted that the requirement to perform additional or superior duties to those normally pertaining to an individual’s rank or employment should only be a consideration for the award of the Distinguished Service Cross or the Distinguished Service Medal. Mr Conlon stated that the correct test should be:

whether an individual discharged their duties (the job that they were trained and expected to perform) to a standard demonstrably (clearly) superior to other soldiers with the same rank, training and experience in similar circumstances.

52. Mr Conlon’s comments also included a detailed study of prior decisions of the Tribunal concerning Distinguished Service Decorations. Mr Conlon addressed eight decisions, four made between 2014 and 2019²⁴ and another four made between 2020 and 2023.²⁵ Mr Conlon noted that in the latter decisions the Tribunal had applied the test applied by Brigadier Bornholt, while in the earlier cases the Tribunal ‘*had been more*

²⁴ See *Soldier P and the Department of Defence* [2014] DHAAT 28, *Billett and the Department of Defence* [2016] DHAAT 10, *White and the Department of Defence* [2019] DHAAT 1, *Gilbert and the Department of Defence* [2019] DHAAT 2.

²⁵ See *Hulse and the Department of Defence re: Jensen* [2020] DHAAT 15, *Hulse and the Department of Defence re: Hughes, Johnson and Walker* [2021] DHAAT 4, *Hulse and the Department of Defence re: Kemp* [2021] DHAAT 5, *Walsh and the Department of Defence* [2023] DHAAT 5.

subjective in assessing the merits of whether the individual's service was distinguished. Mr Conlon submitted that, in those cases, the Tribunal had highlighted the conduct of the individual and the qualities exhibited when determining if the service was distinguished. He submitted that the environment that the individual's service occurred in was also a consideration, *'such as difficult combat operations, challenging circumstances or hazardous circumstances.'* While seeking to not compare his actions to those subject to those reviews, Mr Conlon submitted that the Tribunal had made findings in relation to distinguished service in those cases that he believed might be useful in determining if the performance of his duties on 9 August 2009 was distinguished.

53. Mr Conlon submitted that the decisions in the above cases supported his contention that, to be awarded the Distinguished Service Cross or the Distinguished Service Medal, the 'distinguished service' must be beyond the 'distinguished performance of duties' required to be awarded the Commendation for Distinguished Service. Mr Conlon further submitted that Defence had conflated the conditions for the award of the Commendation for Distinguished Service with the conditions for the award of the Distinguished Service Cross or the Distinguished Service Medal, and that it had erred in its application of the 'additional or superior' test. Mr Conlon also pointed to what he saw as an inconsistency in Defence's consideration of eligibility for Distinguished Service Decorations, in contrast with the test applied by Brigadier Bornholt.

54. Mr Conlon then turned to make his own assessment as to whether his service on 9 August 2009 was distinguished. In doing so, he stated:

What is undisputed is that on 9 August 2009 American Kiowa helicopters engaged individuals that they believed were emplacing an IED. The task our section had was to apprehend a fleeing individual, conduct a search of the area for an IED and assist with the Battle Damage Assessment. The section was also required to provide first aid as two individuals were still alive when we arrived at the location.

My service that day was the high-risk search of the site and the application of first aid to suspected enemy combatants. The performance of my duties that day was distinguished as I discharged duties that were additional or superior to those normally pertaining to my rank and employment. Also, while performing my duties my humanity, leadership, professionalism and character was well beyond what could be reasonably expected from a junior soldier. The qualities I exhibited were clearly superior and should not be overlooked.

55. Mr Conlon referred to the four contentions made in his application about why he believed his actions were worthy of recognition with the Commendation for Distinguished Service, the first being:

a. I was required to search a safe lane and the immediate area around the casualties for a possible IED. This task was made more difficult by the amount of fragmentation from the Hellfire missiles.

and Brigadier Bornholt's corresponding finding, being:

Clearance of a safe lane to the area of the casualties was a task that Sapper Conlon was qualified to perform and expected to do. This was not in my view superior to any other sapper trained to conduct high risk search or clearance.

56. Mr Conlon stated that he disagreed with this finding as, in his view, his actions were clearly superior to any other sapper trained to conduct high risk search for the following reasons:

a While searching I heard Corporal Pascoe giving incorrect information to the soldiers back at the vehicles about the number of casualties and how many were dead or alive. I had the presence of mind to correct Corporal Pascoe and he subsequently passed the accurate information to the medic and soldiers at the vehicles. This is evidence of calmness and professionalism while performing the duties of a Sapper that is clearly superior...

b While searching the area I told Corporal Pascoe to bring the medic down to commence treatment on one of the casualties while we continued the search. Corporal Pascoe listened to my advice and brought the medic down the safe lane so he could start treating the casualty. This decision likely saved that individual's life as it would be a further 5 minutes before treatment began on the second casualty. This is evidence of leadership that is clearly superior to what normally pertains to a junior soldier. This sound and timely guidance provided to my Section Commander, that he listened to and acted upon, was due to my ability to 'influence others to gain their willing consent in the ethical pursuit of missions'...

c The casualties were screaming at us to help them as we conducted our search. This was extremely stressful but I remained calm and continued searching at a safe speed. This calmness and professionalism, while conducting high risk search in horrific circumstances, is evidence of clearly superior performance of duties.

d The section commander was rushing me and trying to get me to search faster but I remained calm and continued to search at a safe speed. I also pushed back on his attempts on one occasion. This is further evidence of my leadership, calmness and professionalism that was clearly superior to what you would normally expect from a junior soldier. The performance of my duties was clearly superior...

e I was required to finish searching the area on my own when Sapper Barry stopped searching to assist the medic. I concede that I was probably just doing what was expected of any sapper at this stage of the search but there is also an expectation that while conducting high risk search that there will be other sappers who will assist. The requirement to search by myself at that point was out of the ordinary.

57. Mr Conlon then referred to the second contention in his application, which was:

While the medic was treating the other casualty, I was required to direct Sergeant Oltvanji, CPL Pascoe and LCPL Bromley while also administering life-saving interventions to my patient.

58. Brigadier Bornholt's corresponding finding which was:

Sapper Conlon's treatment of the casualty as a trained combat first aider was in my view to be expected, although I acknowledge the age of the casualty and horrific nature of his injuries created an extremely confronting situation

59. Mr Conlon stated that he disagreed with this finding for the following reasons:

a I concede that I was expected to treat the casualty as I was a trained Combat First Aider. Was it reasonable given the circumstances to expect me to treat the casualty on my own while directing other soldiers. I say that it was not reasonable. The ability to administer life-saving interventions to my patient while also directing soldiers higher in rank than me was evidence of leadership and combat first aid skills additional and superior to those normally pertaining to my rank and employment...

b There is also an expectation that soon after first aid has commenced that someone with a higher level of medical training will arrive to take over treatment. This did not occur as the medic was focused on treating the other casualty who had sustained catastrophic injuries. I do not think it was a reasonable expectation to expect me to treat the casualty by myself given the catastrophic injuries he had sustained. Treating the casualty on my own while also directing other soldiers who were assisting with treatment were duties additional and superior to those normally pertaining to my rank and employment.

c There is also an expectation that when treating an Afghan patient that an interpreter would arrive to assist with communication. Prior to commencing treatment of the casualty an interpreter had been requested but Corporal Pascoe informed me that there was no interpreter. The interpreter was with the platoon that was securing the 'Chora Crossing'. It was not a reasonable expectation to expect me to treat the casualty by myself without an interpreter given the catastrophic injuries he had sustained. Treating the casualty without an interpreter was a duty additional to those normally pertaining to my rank and employment...

60. Mr Conlon then referred to the third contention in his application, which was:

I demonstrated superior first aid skills by prolonging my patient's life for as long as I did despite his catastrophic injuries. The decision to prioritise the aeromedical evacuation of Priority 3 Australian casualties over suspected enemy combatants is the reason my patient died at the scene.

61. Brigadier Bornholt's corresponding finding, which was:

Sapper Conlon's decisions in relation to prioritising casualties was in my view expected of him and reflected his training as a combat first aider.

62. Mr Conlon stated:

This finding doesn't even address the third contention that I made. I was not saying my actions were superior because I prioritised the casualties. What I was trying to argue but was misunderstood by Brigadier Bornholt was the following:

a That my first aid skills were clearly superior as I was able to prolong my patients life for as long as I did despite his catastrophic injuries. The reason he died at the scene was not because he died quickly it was because the aeromedical evacuation was delayed.

b I made no mention of my decisions in relation to prioritising casualties. I was trying to explain how the US Army evacuated less severe Australian casualties prior to the suspected insurgents. It is my opinion that this was an intentional decision by the US Army and may have been unlawful...

63. Mr Conlon then referred to the fourth contention in his application, which was:

At all times while performing my duties I remained calm, was compassionate and preserved the dignity of a suspected enemy combatant, displaying maturity, professionalism and character well above what you would expect from a junior soldier.

64. Mr Conlon offered the view that this was not addressed in the merits-based assessment. He did however repeat Brigadier Bornholt's statement that:

There is little doubt that Sapper Conlon's actions on (9) August 2009 were compassionate and dignified and performed in horrific circumstances, however, they were not in my view additional and superior to those normally pertaining to his rank and employment. ...

65. Mr Conlon stated:

The respect for humanity that I showed while performing my duties was clearly superior. I was compassionate as I attempted to save the life of a suspected enemy combatant and I preserved his dignity by comforting him as he died. My actions were true to the Defence Values in the most horrific circumstances. My leadership, professionalism and character were clearly superior to those normally pertaining to my rank and employment...

Defence has this to say about 'humanity' in ADF Philosophical Doctrine – Military Ethics

... While respect for humanity places an additional burden on those in conflict, it must never be discarded or discounted. Respecting humanity is central to our

character, as well as to the character and authority of the ADF as an institution.

...

It appears Brigadier Bornholt may have discarded or discounted the respect for humanity that I demonstrated when coming to his findings.

66. Mr Conlon then referred to a number of other factors which he considered relevant to his application and Defence's decision to refuse him for recognition for his actions on 9 August 2009. In doing so, he stated that:

The Gallantry and Distinguished Service Decorations are awarded on a subjective basis, and this is influenced by conscious and unconscious bias. This same bias would have been a factor in the decision of Brigadier Bornholt not to recommend me for the Commendation for Distinguished Service for my actions on 9 August 2009.

67. Mr Conlon argued that his application was subject to 'rankism' (a bias towards awarding medals to officers), tribalism (a bias towards awarding medals to those from a particular corps – in this case the infantry corps - at the expense of others) and the application of a quota. Mr Conlon's comments set out the results of considerable research and analysis to support these claims. He also stated:

I sense that Defence recommending me for two medals for my actions during the same deployment may have been 'a bridge too far'. Was Brigadier Bornholt able to remain objective assessing the merits of my actions for two medals? Would it have been better to get a different Honours Review Officer to separately assess the merits of my actions on 9 August 2009?

68. Along with the factors set out above, Mr Conlon asked that the Tribunal take into consideration whether civilians were potentially killed in the 9 August 2009 incident and if that was a factor that influenced the outcome of Defence's assessment of his service. He also stated:

Although I have opined at length about if the individuals killed on 9 August 2009 were civilians or not, ultimately it does not change the nature of my service. It is a question that has haunted me for the past 14 years but as it was unclear that day it remains unclear to this day. I don't believe anyone will ever be able to tell me if the killing of the young male I watched take his last breath was justified.

69. Mr Conlon's comments also referred to a statement provided by Warrant Officer Class 2 Wayne Meech that was provided by Mr Conlon in his application but not referred to by Defence in its merits assessment. However, it is noted that the statement provided by Mr Meech does not make direct reference to Mr Conlon's actions on 9 August 2009 but primarily deals with his service on 7 July 2009.²⁶

²⁶ Statement and Supporting Comments by 8499815 WO2 Wayne Meech, dated 11 July 2022.

Tribunal Analysis

70. In conducting a review of a reviewable decision, the essential role of the Tribunal is to consider whether that decision was the correct or preferable decision in all the circumstances, having regard to the applicable law and all relevant evidence and considerations, and, if not, what should be the correct or preferable decision. In undertaking that role, the Tribunal must necessarily consider what weight, or persuasive value, should be afforded to the reviewable decision.

Assessment of the Reviewable Decision

71. The reviewable decision in this matter was taken by Lieutenant General Greg Bilton AO CSC, Chief of Joint Operations. His advice to Mr Conlon recorded that Mr Conlon's application had been *thoroughly examined by my staff and a Board of Officers*. While it stated that the Board of Officers had recommended that Mr Conlon should be recommended for the Commendation for Distinguished Service for the events of 7 July 2009, it said nothing about any recommendation the Board may have made in respect of the events of 9 August 2009. In that regard it simply said that:

... I acknowledge the horrendous circumstances of the incident. However, I do not consider your actions to be superior to someone of your rank and employment performing the duties you were trained and expected to undertake whilst deployed as a combat engineer and first aider in Afghanistan. Consequently, your actions on this day do not meet the criteria for the award of a Commendation for Distinguished Service.

72. Accordingly, Lieutenant General Bilton's letter contained no detailed analysis or rationale for the conclusion he reached.

73. It appears that Lieutenant General Bilton took his decision in response to a Decision Brief prepared by Commodore P J Leavy RAN. That brief recounted that a merits assessment of Mr Conlon's application had been undertaken by Brigadier Bornholt, and recommended the same decision as that recommended by Brigadier Bornholt without recording any additional analysis or research. The Decision Brief made no mention of any consideration by or report from a Board of Officers, and the Defence Report prepared for the Tribunal contains no documents or information in that regard.

74. In these circumstances the Tribunal concluded that the decision by Lieutenant General Bilton was effectively taken in reliance on the merits assessment undertaken by Brigadier Bornholt. In stating that conclusion, the Tribunal makes no criticism of Lieutenant General Bilton – it was reasonable for him to have expected that Mr Conlon's application would have been thoroughly researched and that the recommendations made to him would have been soundly based.

75. However, on detailed examination of the process by which Mr Conlon's application was examined, the Tribunal concluded that such expectations, however reasonable, were misplaced. There were multiple defects in that process:

- a) A search was conducted by the Headquarters Joint Operations Command for relevant documents relating to the actions in respect of which Mr Conlon sought recognition. However, that search was limited to *reports/documentation for 8510788 Sapper Rohan Conlon*. Because of this limited form of inquiry, the search failed to disclose any documents in relation to the incident of 9 August 2009 because Mr Conlon was not named in any records that might have existed. In the ordinary course there should have been contemporaneous documents relating to an incident of that significance and they should have been provided to assist Brigadier Bornholt. In the absence of such documents, he proceeded in reliance on the claims made by Mr Conlon in relation to that incident. That was not a satisfactory basis on which to proceed as, conceivably, Mr Conlon might have understated (or overstated) the fact, nature or significance of his actions on that day, or provided an incomplete recounting of relevant matters. [In the ordinary course, the Tribunal would have required Defence to conduct another search to locate all records relating to the incident on 9 August 2009 in order to enable it to undertake the review required of it. However, because of the availability of the helmet-cam footage referred to below, the Tribunal concluded that it was not necessary to do that because the footage provided a self-evidently accurate record of the events in question].
- b) Brigadier Bornholt was aware from Mr Conlon's application that there existed helmet-cam footage of the events of 9 August 2009, but he failed to view that footage. The Tribunal understood that there was consideration being given at that time to whether there had been an offence committed in relation to the 'leaking' of that footage and it was therefore classified as protected. In the Tribunal's view, this provided no satisfactory reason for excluding the footage from the merits assessment which Brigadier Bornholt was tasked to undertake. There could have been no more relevant evidence of the events at the heart of this matter. Reliance solely on the statements made by Mr Conlon was unsatisfactory for the same reasons as noted in the preceding paragraph.
- c) The Defence report noted that, in considering the award of a Distinguished Service Decoration, *the member's entire deployment/rotation is normally considered, rather than just actions in a single action/incident. Notwithstanding this normal process, a Commendation for Distinguished Service may be considered in relation to performance of duties in a singular action/incident*. Despite this normal practice, it is apparent from Brigadier Bornholt's report that he considered Mr Conlon's application insofar as it related to the events of 9 August 2009 only on a stand-alone basis and did not consider Mr Conlon's actions on that day in the broader context of his entire deployment or rotation.
- d) The Defence report also stated that *A number of other factors are considered in reviewing recognition for an individual's performance; most notably, evidence that their performance of duties was of a higher standard than others in similar circumstances. This assessment is based on recommendations or comments from commanders at the time with visibility, and understanding, of that individual's performance within the operational context*. Despite this, it is apparent that Brigadier Bornholt (and consequently Lieutenant General Bilton, albeit inadvertently) failed to take into consideration the statement from Warrant Officer Class 2 (then Corporal) Blake Pascoe who, as Mr Conlon's commander,

was present at the events of 9 August 2009 and stated that on that day Mr Conlon *performed his duty both as a searcher and CFA to the highest standard*. [Notably, while ignoring the Pascoe statement in his negative assessment of the events of 9 August 2009 without giving any reasons for doing so, Brigadier Bornholt did cite it in support of the positive assessment he reached in relation to the events of 7 July 2009, thereby inappropriately approbating and reprobating.]

- e) Notwithstanding its role in administering the Distinguished Service Decorations Regulations, Defence has never adopted any guidelines or definition in relation to the term ‘distinguished’. Instead, it has adopted the rationale underlying relevant Tribunal decisions. In this regard, Brigadier Bornholt stated in his report that he was considering Mr Conlon’s application against the test previously enunciated by the Tribunal that *for service to be ‘distinguished’, an individual in their role or appointment would have successfully discharged duties that were additional or superior to those normally pertaining to the individual’s rank and employment* (emphasis added). Notwithstanding his identification of this test, Brigadier Bornholt went on to conclude that Mr Conlon’s actions were not *additional and superior* (emphasis added). That is, Brigadier Bornholt misapplied the test he had identified.

76. Following receipt of Mr Conlon’s application for review, the Tribunal wrote to Defence seeking the provision of a Defence report. In doing so, the Tribunal asked Defence to *provide the Tribunal with its merits based assessment of Mr Conlon’s actions against the eligibility criteria for the Commendation for Distinguished Service*. At the hearing, the Defence representative confirmed that, in preparing the Defence report, no further merits assessment of Lieutenant General Bilton’s decision was undertaken. Accordingly, the Defence report did not alleviate the Tribunal’s concerns with any of the above issues.

77. The Tribunal considered that, if the reviewable decision had been the subject of judicial review, a court would, in all likelihood, have set the decision aside on grounds such as failure to have regard to relevant considerations, and would have remitted the decision to be re-made according to law.

78. The Tribunal of course is not a court, and it does not undertake judicial review. Moreover, the flaws in process outlined above do not necessarily mean that the conclusion reached by Brigadier Bornholt was incorrect – it is always possible, though never desirable, to reach a correct conclusion through incorrect reasoning. But those flaws did mean, in the view of the Tribunal, that it would be unsafe to attribute any material weight or persuasive value to the reviewable decision reached by Lieutenant General Bilton in reliance on Brigadier Bornholt’s assessment of Mr Conlon’s application to Defence. Accordingly, it decided to assess Mr Conlon’s eligibility for the recognition he sought entirely from first principles.

Additional Concerns and Issues raised by Mr Conlon

79. In his correspondence with Defence and with the Tribunal, and at the hearing, Mr Conlon raised a wide variety of concerns that he held. Many of these ranged well beyond the jurisdiction of the Tribunal, which is limited to considering whether he met the eligibility criteria for the Commendation for Distinguished Service in relation to his actions on 9 August 2009. However, some had some limited relevance. Accordingly, the Tribunal considered it appropriate to record its position in relation to several of the additional concerns he raised.

80. Mr Conlon suggested that the search team commander then-Corporal Blake Pascoe should be awarded a Distinguished Service Medal and the unit medic Captain then-Corporal Malcolm Roberts should be awarded the Commendation for Distinguished Service. The Tribunal cannot consider these issues unless and until applications for such recognition have been made to Defence, Defence has refused to recommend such awards, and an application for review is validly made to the Tribunal.

81. Mr Conlon was concerned that his application for a Commendation for Distinguished Service had been assessed on a subjective basis ‘influenced by conscious and unconscious bias’ and had been refused because of systemic issues that he termed ‘rankism’ or ‘tribalism’ or the application of an informal ‘quota’. In the context of a review, the Tribunal cannot consider such matters. It is legally confined to considering whether or not Mr Conlon’s actions met the eligibility criteria for the Commendation for Distinguished Service, and those issues are irrelevant in that regard. The Tribunal does note, however, that it found no indication in any of the documentation or evidence before it that such factors had been of any influence in the decision in relation to Mr Conlon.

82. Mr Conlon complained about the search conducted by Defence for documents relevant to his actions on 9 August 2009. He queried whether relevant documents were not made available to Brigadier Bornholt because they had been disposed of, and whether disciplinary action had been taken if that was the case. However, the Tribunal suggests that it is unlikely that there has been any such disposal. The fact that they were not produced in the context of Brigadier Bornholt’s merits assessment and in preparation of the Defence report for the Tribunal appears to be due solely to the very (and undesirably) limited search parameters used for the record search that was undertaken.

83. Mr Conlon expressed dissatisfaction with the adequacy of Brigadier Bornholt’s merits assessment insofar as it related to the events of 7 July 2009 and, in particular, with Brigadier Bornholt’s view as to whether or not Mr Conlon had undertaken a leadership role on that day. Lieutenant General Bilton’s decision in reliance on Brigadier Bornholt’s report gave Mr Conlon the specific medallic recognition that he had sought in relation to the events of 7 July 2009. There has been no application for review of that decision in that regard and accordingly, in those circumstances, the Tribunal has no jurisdiction to consider that issue.

84. Mr Conlon also expressed dissatisfaction that there had been no assessment of his actions on either date against the eligibility criteria for a gallantry award. However, as

explained at the hearing, the Tribunal considered this not to be a matter for criticism of Defence. Mr Conlon applied for a Commendation for Distinguished Service and Defence clearly considered his actions against the eligibility criteria for that award. His application did not raise those other issues for consideration. As noted at the hearing, the Tribunal has on occasion considered eligibility for an alternative award to that originally sought by the applicant, but this has generally occurred when the originally sought defence honour has been, in the opinion of the Tribunal, rightly refused. In any event, such cases form no precedent for the present matter.

85. Mr Conlon asserted that the handling of an earlier nomination of him for his actions on 9 August 2009 had been affected by maladministration. He also asserted that the failure to fully investigate the events of 9 August 2009 was a further instance of maladministration. In former times, Defence used to assert that that the Tribunal should interfere with previous Defence decisions only where there was demonstrated maladministration in the manner of their making, or where there was compelling new evidence. The Tribunal did not accept those limitations on its capacity to conduct merits review, and Defence no longer makes those assertions. If there was any maladministration in the consideration of Mr Conlon's application to Defence, demonstrating that was not a precursor to the Tribunal dealing with the merits of his claim for the Commendation for Distinguished Service and any such maladministration has not limited the Tribunal's capacity or preparedness to conduct the present review.

86. Mr Conlon was concerned that the failure of Defence to recommend award of the Commendation for Distinguished Service to him was as a result of a reluctance to recognise, and a desire to 'cover-up', that the four Afghans attacked by the American helicopters on 9 August were civilians rather than insurgents. The Tribunal has seen no indication whatsoever of any such motivation, and that factor has certainly not limited in any way the capacity and preparedness of the Tribunal to squarely address the question of his eligibility for the Commendation for Distinguished Service.

87. Mr Conlon expressed concern about what he considered to be two instances of what he referred to as possible 'unlawful conduct'. One related to the fact that less seriously wounded coalition forces were medically evacuated before the more seriously wounded Afghans who had received first aid from the medic and himself. The other related to the failure to fully investigate the events of 9 August 2009. On 18 September 2023 Mr Conlon was advised that *your allegations have been provided to the Office of the Special Investigator (OSI) and to the Joint Military Police Unit (JMPU)* and he was provided with contact details for those bodies. On 23 September 2023 Mr Conlon was additionally advised by Defence that *These allegations ... have been referred to the relevant investigative authority for consideration. This will now be handled in accordance with their investigative procedures, noting that the investigative body and process are independent of Army. It may be that those areas reach out to you for further information if necessary.* The Tribunal has no relevant jurisdiction in relation to such allegations. However, it does believe that referral of them to the OSI and the JMPU was appropriate. Further, it considers that Mr Conlon has done all that he reasonably could to draw his concerns to attention and that it may well be in his own best health interests that he now entrusts the appropriate consideration to the OSI and the JMPU unless either body seeks further input from him.

Merits Review

88. The Tribunal now turns its attention to the central issue of assessing whether or not Mr Conlon's actions on 9 August 2009 warrant recognition by a Commendation for Distinguished Service.

89. At the heart of this assessment is the meaning to be attributed to the term 'distinguished'. That adjective applies to each of the three Distinguished Service Decorations, the difference between them being the specified actions or qualities that are required to be 'distinguished'. The Regulations contain no definition of the term, and Defence has never promulgated any internal guidelines to assist its own decision-making. Instead, as Brigadier Bornholt stated, Defence has relied on the position adopted by the Tribunal over time, and has not adopted any higher standard than the Tribunal. In these circumstances, it is appropriate to review the position that has been previously adopted by the Tribunal in ascertaining the meaning of 'distinguished' in the eligibility criteria for the various Distinguished Service Decorations.

90. In the case of *Soldier P [2014] DHAAT 28* the Tribunal noted that the Regulations did not define the term 'distinguished' and thus considered the various definitions of these two terms in dictionary.com, The Macquarie Dictionary, The Oxford Dictionary and The Merriam-Webster Dictionary which generally referred to qualities such as conspicuous, excellence and eminent. The Oxford Dictionary, in particular, defined 'distinguished' as 'very successful, authoritative and commanding great respect'. That case concerned the eligibility criteria for a Distinguished Service Medal and the Tribunal concluded that *To be awarded the DSM a person must exhibit qualities that distinguish him or her from the usual commander. The person would exhibit the above qualities in such a way that they would be considered an exceptional leader of their platoon.*

91. In considering the eligibility criteria for the Distinguished Service Cross in *White [2019] DHAAT 01*, the Tribunal concluded that Captain White's actions demonstrated distinguished command and leadership in action because *the command and leadership displayed by Captain White, enabled by his gallantry, was of a standard well above what could be reasonably expected of an officer of Captain White's rank, experience and training. The Tribunal determined that this was particularly so given the size and complexity of the force he commanded and the extremely challenging command and leadership circumstances he faced and overcame in the most hazardous of situations.*

92. In *Gilbert [2019] DHAAT 02* the Tribunal affirmed a decision to award the Distinguished Service Medal. In doing so the Tribunal noted that application of the term 'distinguished' is subjective and that it is defined in the Oxford Dictionary as 'very successful, authoritative, and commanding great respect' and 'remarkable for or by the quality of excellence'. The Tribunal considered that Lieutenant Colonel Gilbert's actions were distinguished in that the evidence pointed to the skilful manner in which he applied his craft, the remarkable way he was able to swiftly establish his location and excellence in his application of indirect fire in the most difficult of circumstances. All of this resulted in an outcome which was undeniably successful.

93. In *Hulse obo Jensen [2020] DHAAT 15* the Tribunal said:

the first step in determining whether an individual's service is distinguished is to define what that service was. The Tribunal considers that 'service' in warlike operations may relate to the individual's appointment, role or posting, or it may relate to a period of time, such as a particular operation, during which an individual's achievements were worthy of recognition. It is unlikely that such service would be for a single action or act, but rather for a specific duration, although that duration may vary according to the circumstances. Any assessment of performance will relate to the entirety of the period involved.

The Tribunal further considered that for service to be 'distinguished', the individual in that role or appointment would have successfully discharged duties which were additional or superior to those normally pertaining to the individual's rank and employment.

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

For distinguished leadership, an individual must be in a position where leadership is required and his or her leadership must be demonstrably superior to others with similar employment, responsibility and rank. Such leadership should have been evident for the period under consideration. Whilst definitions of leadership abound, the Tribunal was satisfied that the common qualities found in successful operational leaders included example, judgement, courage and willpower. Successful leadership is not a product of rank or responsibility, the most junior sailor, soldier or airman can display 'distinguished leadership' depending on the circumstances.

Was Lieutenant Jensen's Service Distinguished? The Tribunal considered that Lieutenant Jensen's service was distinguished. He successfully discharged his duties as the officer commanding the mortar line in unprecedented circumstances and performed those duties in a superior manner in comparison to those normally pertaining to a junior officer in combat. The Tribunal also noted that there was evidence that Lieutenant Jensen's distinguished service was not just confined to the one action. He is said to have performed to a superior level in re-constituting his mortar line and commanding it on 16 May 1968. He later moved to command a rifle platoon and again is said to have distinguished himself. For

the purposes of the Distinguished Service Decorations, the Tribunal was of the view that it could be seen that Lieutenant Jensen's distinguished service encompassed the entirety of his deployment as a junior commander in 1968 and was not just confined to his actions on 13 May 1968.

94. In *Hulse obo Hughes, Johnson and Walker [2021]* DHAAT the Tribunal said:

The first step in determining whether service is distinguished is to define what was that service. While the Tribunal considers that 'service' in warlike operations may relate to an individual's appointment, role or posting, in the absence of any guidance to the contrary the Tribunal does not consider that there is any requirement under the regulations to restrict the concept of 'service' in this manner.

In this particular application, the Tribunal regards the conduct of resupply as the service rendered. In considering whether that service could be regarded as 'distinguished' the Tribunal had regard as to whether the men discharged duties that were superior to those normally pertaining to their rank and appointment. Was performance of their duties by these men demonstrably superior? Although the Tribunal accepts that ammunition resupply would not normally be a task conducted by the mortar crews, it did not consider that it was a task demanding any particular additional or superior abilities and preferred to accept the evidence of Lieutenant Colonel Jensen that he had full confidence in his men's ability to complete the task.

The Tribunal finds that Privates Hughes, Johnson and Walker's actions in responding to the low ammunition state of the mortar platoon and acting with initiative under the direct instructions of the officer commanding the mortar line were highly commendable. Their ability to act decisively to complete their assigned task under enemy fire, while exposed to the additional risk of engagement by their fellow soldiers, demonstrates their personal courage and an admirable devotion to duty. However, the Tribunal did not consider the actions to merit recognition under the gallantry awards.

The Tribunal also determined that the men's actions were not so demonstrably superior to others of similar rank or appointment to meet the conditions for award of the Commendation for Distinguished Service.

95. In *Hulse obo Kemp [2021]* DHAAT the Tribunal said:

'in warlike operations', the Tribunal considered whether Colonel Kemp's command and leadership was distinguished. In considering whether that service could be regarded as 'distinguished' the Tribunal had regard to both the nature of his command and leadership responsibilities and whether those

responsibilities were additional or superior to those normally pertaining to his rank and appointment.

The Tribunal was satisfied that the size, breadth and complexity of Major Kemp's command exceeded that of other officers of his rank serving in Vietnam. The Tribunal also gave weight to Lieutenant Colonel Hulse's evidence that the breadth and complexity of the command exceeded that of some other Lieutenant Colonels serving in Vietnam, and that the record confirms the large size of his command.

The Tribunal also accepted that Major Kemp's command was not just distinguished by the size and complexity of the unit under his command but also by his achievements during his tenure. Achievements noted by the Tribunal included: - developing and trialling new systems for clearing mine fields; - personally retrieving the bodies of his soldiers from an active minefield; - consistent demonstration of effective leadership of men employed across a diversity of tasks, through his personal example, contact and encouragement; - effective perimeter defence while under significant enemy attack at FSB Coral; - effective leadership and command of a much larger Field Squadron than would be deployed in the current context; and - effective management of engineering tasks in a complex (multi-national) chain of command environment.

96. And in Walsh [2023] DHAAT 5 the Tribunal said:

In the absence of a formal definition within Defence, this arrangement seemed rather arbitrary and begs the question as to how members of these boards could, in the absence of a reasonable definition, confidently determine that performance fell short of being distinguished.

As part of the review process, Defence also confirmed that it does not apply a higher threshold than the view set out in recent Tribunal decisions. This stance was reinforced throughout the Defence Report, in which Defence referenced previous Tribunal definitions of 'distinguished' which question whether candidates 'discharged their duties that were superior (emphasis added) to those normally pertaining to their rank and appointment', and whether the 'performance of duty was demonstrably superior (emphasis added) to others or to the expectations of the role'.

Superior vs distinguished

Most dictionaries and thesauruses consider the terms 'superior' and 'distinguished' to be interchangeable; each being a synonym for the other. This is not particularly helpful because it means that—other criteria momentarily set aside—a CJOPS Gold Commendation could be awarded on the basis of superior

performance, just as a CDS requires superior or demonstrably superior performance. Under this arrangement, the only logical conclusion was that (assuming that the requirement for warlike service can be temporarily removed from consideration) any individual who might qualify for one, is technically able to be considered for the other.

The Tribunal also considered that the term ‘demonstrably superior’ was not sufficiently granular to provide any real differentiation. The word ‘demonstrably’ was typically taken to mean ‘clearly’ and the Tribunal saw as self-evident that when assessing whether an individual was ‘demonstrably superior to others’, any assessor who awards a ‘superior’ rating does so without reservation. In its view, the assessed member clearly deserves the rating, otherwise a lesser rating would have been awarded. In other words, the act of rating an individual as superior arguably just means that the assessor sees that individual as being demonstrably superior.

The Tribunal considered that Lieutenant Colonel Walsh’s performance, as documented in his the End of Tour Report, and supported in-principle by the award of the Afghan Medal of Honor, was clearly superior to others and well beyond the expectations of his rank and appointment. This view was based upon the consistent use of superlatives that consistently spoke to the unprecedented or actions/attributes beyond the prescribed; this included comments such as his unparalleled diligence and commitment, voluntarily taking on ‘an enormous workload far beyond that expected of his rank or position’, and demonstrating a capacity for work that the senior assessor had ‘rarely witnessed’. Further, his chain of command highlighted his refusal to accept failure in an environment where the Tribunal considered that failure was a frequent outcome (particularly in the short-term), his tenacity and ability to get things done in an exceptionally challenging environment, and personal achievements that allowed him to turn an under-developed role into ‘the standout role in terms of tangible achievement and success’. In the Tribunal’s view, this clearly positioned Lieutenant Colonel Walsh in the upper echelons of superior performance, and characterises his deployed performance as distinguished.

97. It is clear that, in preparing his report, Brigadier Bornholt focussed on the concept of ‘additional or superior’ enunciated in *Jensen*. While he was not wrong in doing so, the Tribunal considered that the concept of ‘distinguished’ in the Distinguished Service Decorations Regulations is somewhat more nuanced than might be suggested by that simple phrase. In this regard the Tribunal agreed with Mr Conlon’s assertion that:

In those decisions the Tribunal Members had been more subjective in assessing the merits of whether the individual’s service was distinguished. They highlighted the conduct of the individual and the qualities exhibited when determining if the service was distinguished. The environment that the individual’s service occurred

in was also a consideration such as difficult combat operations, challenging circumstances or hazardous circumstances.

98. Accordingly, the Tribunal considered it appropriate to set out the following guidelines in amplification of the concepts of *duties or responsibilities which were additional or superior to those normally pertaining to their rank, appointment, employment or position* variously used in the previous cases, and it adopted those guidelines to assist it in the conduct of the present review:

- a) service involving command and leadership, leadership or performance of duties may be considered to be ‘distinguished’ having regard to actions taken or qualities displayed either:
 - i. on a single occasion; or
 - ii. across a longer period such as a rotation, posting/tour or career;
- b) service may be ‘distinguished’ when it involves undertaking significant additional duties over and above those reasonably expected of the individual’s rank or role, provided that all duties are undertaken successfully, authoritatively or in a manner commanding great respect having regard to the degree by which they exceeded the usual expectations of the individual’s rank or role;
- c) service may also be ‘distinguished’ notwithstanding that it involves only performing the duties expected of the individual’s rank or role, provided that such performance is clearly superior when compared to the reasonable expectations of the usual performance of others of the same rank, in the same or similar role/s or in similar circumstances:
 - i. by significantly exceeding those reasonable expectations on a particular occasion; or
 - ii. by meeting the level of reasonable expectation consistently and reliably over an extended period in the most demanding and exceptional circumstances;
- d) the concept of superior performance is not met by simply performing better than others on the same occasion or over the same period. Given that others may be performing at a level below what is reasonably expected of them, the proper basis of comparison is by reference to reasonable expectations;
- e) in either event, regard should be had to all relevant circumstances such as:
 - i. the experience and training of the individual;
 - ii. the size, breadth and complexity of the task performed; and

- iii. the nature of the environment in which the service was performed; but
- f) even where ‘distinguished’ service has been performed on an occasion or over a period, because Defence honours and awards are granted in exercise of the Governor-General’s discretion and not as a matter of entitlement, it may nevertheless be appropriate to withhold grant of a Distinguished Service Decoration (or any other honour or award) where there are other countervailing factors in an individual’s conduct that mean that grant would be inconsistent with the integrity of the Defence honours and awards system.

99. The Tribunal decided to adopt these guidelines notwithstanding two contrary arguments advanced by Mr Conlon.

100. First, Mr Conlon argued that the ‘additional or superior’ test identified by Brigadier Bornholt was inapplicable in relation to the Commendation for Distinguished Service and should only be adopted in relation to testing eligibility for the Distinguished Service Cross and the Distinguished Service Medal. He said:

The requirement to perform additional or superior duties to those normally pertaining to an individual’s rank and employment should only be a consideration for the award of the Distinguished Service Cross or Distinguished Service Medal. It is an unnecessarily onerous test for the Commendation for Distinguished Service which is the third level Distinguished Service Decoration.

101. At the same time, however, he did argue that:

The test for the Commendation for Distinguished Service should be whether an individual discharged their duties (the job that they were trained and expected to perform) to a standard demonstrably (clearly) superior to other soldiers with the same rank, training and experience in similar circumstances.

102. Effectively, therefore, he was adopting the ‘superior’ limb of the test, but not the alternative ‘additional’ limb. The Tribunal did not agree with this argument. It saw no reason in law or logic why a soldier who takes on an additional role, for example when another superior officer is killed, wounded or otherwise unable to perform their role, should be denied the opportunity of qualifying for a Commendation for Distinguished Service. [Of course, to the extent that Brigadier Bornholt inconsistently stated that he had applied an ‘additional and superior’ test, Mr Conlon was right to object.]

103. And in any event, in the final analysis Mr Conlon did adopt the additional or superior test when he argued that:

My service that day was the high-risk search of the site and the application of first aid to suspected enemy combatants. The performance of my duties that day was distinguished as I discharged duties that were additional or superior to those normally pertaining to my rank and employment. Also, while

performing my duties my humanity, leadership, professionalism and character was well beyond what could be reasonably expected from a junior soldier. The qualities I exhibited were clearly superior and should not be overlooked.

104. Second, in a further submission lodged after the Tribunal hearing, Mr Conlon argued that if the test applied by Defence in his case was correct, then numerous previous awards of the Commendation for Distinguished Service must have been wrongly made. In putting this argument, he was not wishing to challenge any of those previous awards, but only to highlight what he perceived to be error in the test applied and decision made in his case. The Tribunal was not convinced that Mr Conlon was correct in asserting that other awards would not have been justifiable on the ‘additional or superior’ test, at least as that test is viewed in light of the guidelines adopted by the Tribunal in this case as set out above. In any event, the Tribunal’s task in this case is not to review previous grants but to assess whether, having regard to all relevant considerations, Mr Conlon’s actions met the eligibility criteria for the Commendation that he has sought.

105. It is thus necessary for the Tribunal to identify the actions in respect of which Mr Conlon sought that Commendation.

Mr Conlon’s actions on 9 August 2009

106. On 9 August 2009 a US Kiowa helicopter launched two Hellfire thermobaric missiles against, and hit, four people observed travelling on two motor bikes on a dirt road through the dasht near Chora and who were suspected of being Afghani combatants emplacing IEDs.

107. As part of Operation GRAM GHAR, Mr Conlon was in a PMV as part of a section that, being the closest search team to the incident scene, was dispatched with a view to ensuring that it was clear of any residual IED. When the PMV reached a point at which it was considered unsafe to proceed further without a clear lane having been identified by use of metal detectors, he and Sapper Barry were directed by the search team commander, then-Corporal Pascoe, to find that clear lane. Mr Conlon explained that he and Sapper Barry were chosen for this task over other Sappers who could have used the metal detectors because they were each also trained in Combat First Aid. In this way, if survivors of the Kiowa attack were found, they could be provided with first aid while placing the minimum number of ADF personnel at risk.

108. Mr Conlon proceeded ahead of Sapper Barry, and Corporal Pascoe (who was wearing the helmet camera that recorded the footage that has been of great assistance in this review) followed after them. Mr Conlon carefully and thoroughly tested a lane towards the incident site, detecting a number of pieces of metal and examining each to ascertain whether they were debris from the Hellfire missiles, wreckage from the motor bikes, or potentially indicative of an IED. As he got closer to the incident site, it became apparent that one and then two of the presumed combatants were still alive. When Mr Conlon considered that a sufficient path had been cleared to allow access to one of the survivors, he advised Corporal Pascoe to direct the team medic, Corporal Roberts, to come forward along that path to commence treating that survivor. Mr Conlon then continued to use his metal detector to search around the perimeter of the incident site and

then progressively inward towards the second survivor and around the two deceased and the wreckage of the motor bikes. When he was satisfied that it was safe to do so, he commenced providing first aid to the second survivor who had been gravely injured.

109. In providing that first aid, Mr Conlon drew not only on his Combat First Aid training but also received some supervision and advice from Corporal Roberts, the team medic, who was primarily treating the other survivor. He also enlisted the aid of other unit members (some more senior to himself – Lance Corporal Bromley, Sergeant Oltvanji and Corporal Pascoe) who had come to the site along the clear lane, asking them for example to hold fluid bags over the survivor to allow gravity feed, and to try to encourage the survivor to maintain consciousness, while he administered pain relief and applied dressings.

110. The survivor who was the primary responsibility of the medic was able to be medically evacuated. Regrettably, the second survivor to whom Mr Conlon was the primary first aid provider passed away before he could be evacuated. One of Mr Conlon's concerns is that, in his view, evacuation priority was afforded to less severely injured coalition members rather than to the more severely wounded Afghans. Another of his concerns is that, when the incident site was examined, there was no sign that the four Afghans were combatants or insurgents rather than civilians, and that it was apparent that the one treated by Mr Conlon was only of low to mid teen age.

111. As is apparent, in the course of these actions Mr Conlon drew on both his High Risk Search Operations training and his Combat First Aid training. He did not undertake any 'additional' tasks outside those of the roles for which he was trained.

112. Accordingly, it is next necessary to consider whether his performance was 'superior' and thereby warranting assessment as 'distinguished'. The Tribunal undertook this consideration in two phases – first, looking at the events of 9 August 2009 in isolation on a stand-alone basis and, second, looking at those events on the broader context of his tour of Afghanistan.

Actions viewed on a stand-alone basis

113. Of key importance to Mr Conlon's actions on the day, he used an F3 Minelab metal detector to find a clear lane to the incident site. In this regard Mr Conlon stated that:

I was not trained to use the F3 Minelab that we were using in Afghanistan. I did not complete a formal course to obtain that proficiency until around 2015 when I commenced my Explosive Ordnance Disposal training. Prior to deploying to Afghanistan our Troop only had access to two F3 Minelabs and I did not operate it during pre-deployment training. The only training I received on how to operate the F3 Minelab was a 'Soldier's Five' from the combat engineers from MRTF-1 when we arrived in Afghanistan.

114. The issue of training has rarely been central to previous Tribunal consideration of distinguished service since the majority of cases have (quite reasonably) relied on an unstated assumption that appointed personnel had been adequately trained for the role for which they were nominated.

115. However, in this case the Defence merits review made the issue of training particularly relevant when Brigadier Bornholt stated that:

*I do not consider your actions to be superior to someone of your rank and employment performing the duties you were **trained** [emphasis added] and expected to undertake whilst deployed as a combat engineer and first aider in Afghanistan.*

116. The Tribunal thus gave detailed consideration to whether or not the extent of Mr Conlon's training in the use of the FS Minelab should impact on the assessment of whether or not his actions were 'distinguished'.

117. Mr Conlon referred to the training he had received in use of the metal detector as 'soldiers five' and he directed the Tribunal's attention to Defence documentation that referred to 'father-to-son' training. The Tribunal thus sought detail as to the training he had in fact received.

118. At the hearing, it became apparent from testimony provided by Mr Conlon that he had trained on a previous variant of the F3 Minelab (this being the F1 Minelab) during the High Risk Search Operation Course he completed in mid-2006. It also became clear that the 'soldiers five' F3 Minelab familiarisation training he received in Afghanistan included exposure to recently constructed explosive ordnance lanes at an in-theatre range, practical assessments that included locating embedded devices using the F3 Minelab, and exposure to a brushing technique. This training lasted approximately half a day and it was apparent that it went far beyond simply advice as to how to turn the detector on and off and the meaning of the various sounds it might emit. Mr Conlon also acknowledged that he had used the F3 almost daily since this induction training.

119. The Defence documentation to which Mr Conlon referred showed that Defence had serious concerns at that time about the adequacy of MRTF combat engineer training. It stated that:

The current level of deployed search/mine/route clearance capability has been diluted over time. Sub-standard 'father-to-son' familiarisation training on the Handheld Standoff Mine Detection System (HSTAMIDS) inherited from previous MRTFs has created an Unacceptably HIGH and ongoing risk that unqualified operators could 'miss or misclassify a mine'. The qualification of all HSTAMIDS operators on the (40 hr) manufacturer's training course and implementation of a continuation training regime would reduce this risk to MEDIUM which is acceptable to Army.²⁷

²⁷ AB1887589, Handheld Standoff Mine Detection Systems (HSTAMIDS) - Remediation of Deployed Combat Engineer Force Element Capability, Minute, Army Headquarters to DMO, 24 July 2009, referenced at Attachment 10, pp 234-235.

120. Although this documentation referred to HSTAMIDS (not the F3 Minelab)²⁸, the Tribunal accepted that (for the most part) the sentiments espoused by this document could have reasonably applied to F3 Minelab training. This included the acknowledgement of training deficiencies generated by ‘father-to-son’ training and the added level of risk to an already high-risk activity.

121. In relation to the statement that sub-optimal training might result in a situation whereby unqualified operators could ‘miss or misclassify a mine’, Mr Conlon expressed the view at the hearing that members of his Troop were *learning to be proficient on the job* while on rotation, and to illustrate this point, advised the Tribunal that in July and August every section on in his Troop had missed finding at least one device, which led to IED strikes on the unit.²⁹

122. The Tribunal concluded that Mr Conlon had been trained to the standard of the day in the High Risk Search role he was tasked to undertake on 9 August 2009. While the training that he received in use of the F3 Minelab may indeed have been less than optimal and less than was later introduced, it was apparent from the helmet-cam footage that Mr Conlon’s use of the metal detector was thorough, and the efficiency of his search is evidenced by the fact that there appears to have been no undetected IED and that all ADF members entering the incident scene did so in safety. For these reasons, it appeared to the Tribunal that Mr Conlon’s search actions met what would have been the reasonable expectations of his rank and role.

123. Accordingly, notwithstanding that he had received less than optimal training, the Tribunal did not consider that simply using the device in accordance with that training meant that his search activity was ‘superior’ or warranting classification as ‘distinguished’. The Tribunal understands that the exigencies of war may often mean that new technology has to be introduced into service ahead of optimal conditions being first established.

124. The other key to Mr Conlon’s action on the day was his administration of combat first aid.

125. In that regard, so far as the Tribunal could detect from the helmet cam footage, in exercise of his Combat First Aid training he did all that could reasonably have been expected of him to preserve the life of the youth he treated. The fact that the youth succumbed to his wounds reflects in no way adversely on Mr Conlon. He maintains that he kept the youth alive for far longer than would have otherwise been the case, and that he might possibly have survived if evacuation had been available before he succumbed. Notwithstanding that those claims are inherently speculative, the Tribunal did not dispute and was prepared to accept them.

126. It is also apparent from the footage that Mr Conlon remained calm during the very confronting and undoubtedly horrific situation, that he was compassionate, mature, professional and respectful of the human life he was treating, and that he gave clear and concise instructions to the other medically-untrained ADF members whose assistance he

²⁸ HSTAMIDS combines highly sensitive metal detection with ground-penetrating radar and advanced data fusion algorithms, all in a rugged, compact system. This sets it apart from most metal detectors such as the F3 Minelab.

sought. Mr Conlon claimed that his attitude to and compassion for the youth was not shared by all ADF personnel at the time, some of whom initially displayed apathy towards or made disparaging remarks about the Afghans until they followed the examples set by Corporal Roberts and himself. However, while that might mean that his performance was superior to that of those others, as noted in the guidelines enunciated above the Tribunal considers that the proper and primary comparison is by reference to reasonable expectations rather than the actions of others.

127. At the hearing Defence did not challenge any of Mr Conlon's claims in these regards and accepted that he had done all that he reasonably could to preserve the life of the fatally injured youth. Defence accepted that there was nothing more that he could or should have done in that regard.

128. Mr Conlon referred to the Combat First Aid training course that he had undertaken in December 2008 and the Tribunal examined its syllabus closely. Mr Conlon said that the exercises undertaken during the course of that training had involved the triage and provision of aid to only one person at a time and had not called upon him to enlist the aid of others in the provision of aid. The Tribunal noted however that the course syllabus did on a number of occasions refer to aid being provided to multiple persons, and that the concepts of triage and prioritisation dealt with in the course necessarily implied that the trainee might need to deal with multiple casualties. The Tribunal thus did not consider that the circumstances he confronted on 9 August 2009 would have been beyond the skill set that would in all likelihood have been developed through that training.

129. Mr Conlon argued that he displayed 'leadership' on 9 August by telling Corporal Pascoe to get the team medic to come down to the incident site, and by giving instructions to other ADF members untrained in first aid, some senior to him, to assist him in his provision of first aid to the youth he treated. The Tribunal accepted that he took these actions, but was not satisfied that they constituted the exercise of 'leadership'.

130. The very act of clearing a lane was for the purpose of allowing others to proceed along that lane, and informing Corporal Pascoe that there was a lane that could be used to allow another ADF member to come forward and perform their specialist role appeared to the Tribunal to be simply an inherent element of the High Risk Search Operations in which Mr Conlon was trained. And seeking and directing the assistance of others in simple tasks in support of his provision of the Combat First Aid in which he was trained seemed to the Tribunal to not warrant the description of leadership. In either case, however, while not viewing his actions as 'leadership', the Tribunal did regard these actions by Mr Conlon as evidence of his performance of his role at the highest standard of reasonable expectation.

131. The Tribunal noted that there were certain parallels between Mr Conlon's actions on 7 July 2009 and those on 9 August 2009 – on each occasion he was required to find a clear lane through terrain potentially containing IEDs and then administer first aid to seriously wounded individuals. Accordingly, the Tribunal asked Defence at the hearing how it distinguished between the actions of the two days in order to justify the claim that one set warranted award of the Commendation for Distinguished Service while the other did not. The Defence representatives appeared unable or unwilling to offer any detailed analysis to support that Defence position. While Mr Conlon argued that his actions on the latter date were equally deserving of that same recognition, the Defence reticence

meant that the Tribunal had to examine this question without the assistance that might otherwise have been provided.

132. While noting those parallels were present at a high level, the Tribunal considered that there were material differences between the circumstances on the two dates:

- a) on 7 July Mr Conlon had to clear a lane after he had himself been subjected to the physical shock of an IED explosion, whereas on 9 August that was instead a possibility largely avoidable by careful searching by him;
- b) on 7 July Mr Conlon was himself wounded in the IED explosion but carried on regardless until he was able to hand over the medical care of the injured to others;
- c) on 7 July Mr Conlon was required to triage and provide aid to multiple wounded, while on 9 August he was only required to provide first aid to one person;
- d) on 7 July, in addition to himself providing first aid, he also mentored the less-experienced Sapper Barry while on 9 August he received some mentoring or oversight by the team medic; and
- e) on 7 July the wounded were comrades to whom Mr Conlon may well have felt a stronger emotional bond than those requiring first aid on 9 August.

133. In light of these marked differences, the Tribunal concluded that Mr Conlon's actions on 7 July were more evidently deserving of recognition as 'distinguished' and that, as a result, the decision to award the Commendation for Distinguished Service for those actions could not be viewed as necessarily inconsistent with the decision to refuse the same recognition for his actions on 9 August.

134. The Tribunal then turned to the statement by Corporal (now Warrant Officer Class Two) Pascoe insofar as it related to the events of 9 August 2009. As noted above, Brigadier Bornholt and implicitly Lieutenant General Bilton did not have regard to this in the assessment of Mr Conlon's actions on that day, notwithstanding that Warrant Officer Pascoe was directly present on the day and in a team commander position in respect of Mr Conlon.

135. Warrant Officer Pascoe's statement provides a description of the events of 9 August that appears in its detail to be somewhat at odds with the helmet cam footage, but this is perhaps explained by the fact that he did not have access to it at the time he wrote his statement many years after the events he described. Notwithstanding this, the footage nevertheless shows that Warrant Officer Pascoe was clearly in a position to closely observe and form an assessment of the quality of Mr Conlon's performance. His conclusion is stated to be that Mr Conlon (*performed*) *his task as the lead searcher without question to a high standard in a very sensitive and high pressure environment and that On this day, SPR Conlon performed his duty as both a searcher and CFA to the highest standard.* While this was obviously a statement of praise, its terms appeared to the Tribunal to not extend beyond saying that Mr Conlon met all reasonable expectations.

136. In light of all of the above, it was clear to the Tribunal that on 9 August 2009 Mr Conlon would have fully met all reasonable expectations of him both as a High Risk Searcher and as a Combat First Aider. While his performance was clearly admirable, the Tribunal was however not convinced that it was so far above those expectations as to meet the description ‘superior’ and thereby warrant recognition as ‘distinguished’ when viewed as a stand-alone incident and in isolation.

137. Accordingly, the Tribunal was not satisfied that Mr Conlon’s actions on 9 August 2009 viewed in that limited context met the eligibility criteria for a Commendation for Distinguished Service as applied in accordance with the guidelines adopted by the Tribunal in this case. To this extent, it agreed with the conclusion reached by Brigadier Bornholt and the decision taken by Lieutenant General Bilton, albeit that it did not agree with their processes of analysis.

Actions viewed in a broader context

138. As noted by Brigadier Bornholt in his merits assessment, by Defence in its report to the Tribunal, and in the guidelines adopted in this case by the Tribunal, performance is not required to be assessed only on a stand-alone basis but may also be viewed in the broader context of a longer period such as a tour of duty. It was apparent from Brigadier Bornholt’s assessment and Lieutenant General Bilton’s decision, and conceded by Defence at the hearing, that this broader examination was never undertaken.

139. Accordingly, the Tribunal considered whether Mr Conlon’s performance across his tour in Afghanistan during 2009– 2010, generally and particularly in combination with his actions on 7 July which have been recognised by award of a Commendation for Distinguished Service, warranted the description ‘distinguished’ in accordance with the guidelines set out above.

140. In Defence report and at the hearing Defence offered no criticism of Mr Conlon’s performance during that tour. More specifically, at the hearing Defence agreed that on 9 August 2009 Mr Conlon’s performance at least met all reasonable expectations and that there was nothing more that he should or could have done having regard to his rank, experience and training.

141. And Warrant Officer Pascoe’s broader assessment of Mr Conlon’s performance was as follows:

I was SPR Conlon’s section commander for approximately 7 months of the MRTF-2 deployment, during this time I relied heavily on his exemplary performance as a combat engineer sapper and so did the infantry call signs we were attach to throughout this deployment. His knowledge, actions and ability to perform under extreme pressure was well beyond the standard of a soldier in his position. He should be extremely proud of his service during this time.

142. Notably while Brigadier Bornholt called in aid Warrant Officer Pascoe’s assessment of Mr Conlon’s actions on 7 July, he ignored his views of Mr Conlon’s actions not only on 9 August but also across the longer period of his tour where his assessment was that Conlon’s performance was *well beyond the standard of a soldier in his position.*

There is no evidence that Lieutenant General Bilton had regard to those views either, presumably explained by an expectation that Brigadier Bornholt would have done so.

143. Mr Conlon advised the Tribunal that 7 June and 9 August 2009 were the only occasions on which he was called on to exercise his Combat First Aid training and skill. Thus, while trained, he was inexperienced. Further, the practical exercises undertaken in his training did not closely replicate the factual circumstances that he confronted on either 7 July or 9 August 2009. And, he was on each occasion confronted by extremely severe injuries in horrific circumstances that were undoubtedly visually and emotionally challenging and confronting.

144. The Tribunal considered that the circumstances in which Mr Conlon rendered first aid on each of 7 July and 9 August 2009 were exceptional for a number of reasons:

- a) on 7 July 2009 Mr Conlon had himself being subjected to an IED explosion in close proximity, and had been wounded as a result;
- b) notwithstanding, on that day he was required to treat comrades who had suffered serious injuries requiring life-saving treatment;
- c) on 9 August 2009 Mr Conlon had reason to believe that there was at least one IED in or around the incident site that might still be live;
- d) on that day he was confronted by the continuing screams and pleading of two critically wounded Afghans who he could not commence to treat until he had completed searching the area with his metal detector;
- e) when he was able to commence treatment, he was confronted by the realisation that the dead and wounded were apparently civilians rather than combatants, and that the person he was treating was a young teenager;
- f) and the scene in which he had to provide that treatment was quite grotesque, with the remains of one of the deceased appearing to have been frozen as though he was still controlling the motor bike he was riding when hit by the Hellfire missiles.

145. To be able to deploy his skills at the very top of what could reasonably have been expected and to do on each occasion so consistently and in an exemplary manner in such demanding and exceptional circumstances appeared to the Tribunal to be evidence of 'superior' performance and thus warranting recognition in the Commendation for Distinguished Service.

146. Finally the Tribunal considered that there was nothing in Mr Conlon's service record of such a nature as to raise a countervailing reason why the executive discretion should not be exercised to award that Commendation. In so doing it noted that the Commendation for 7 July 2009 had been recommended in July 2023 and the likely cause of events leading to Mr Conlon's medical discharge. At the hearing the Defence representatives agreed that they saw no countervailing reason why the Commendation should not be extended to cover the events of 9 August 2009 if the Tribunal reached that

view.

147. The Tribunal thus concluded that the correct and preferable decision should have been to recommend to the Minister that he recommend to the Governor General that Mr Conlon be awarded the Commendation for Distinguished Service accompanied by a citation that expressly recognised his actions on both 7 July and 9 August 2009.

148. In these circumstances, the Tribunal decided to recommend that the citation to Mr Conlon's Commendation for Distinguished Service should be amended before it was formally awarded to him (and if necessary re-gazetted) to read along the following lines (with additional text shown by underlining) - the Tribunal thought it desirable that Defence work with Mr Conlon to settle this citation, and in doing so address any remaining disagreement regarding the description of his service on 7 July 2009:

For distinguished performance of duty whilst deployed on warlike operations as a Combat Engineer in Mentoring and Reconstruction Task Force 2 on Operation SLIPPER on 7 July 2009 and 9 August 2009.

In 2009, Mr Rohan Paul Conlon, then a Sapper, was employed as an Explosives Ordnance Device Technician within 3rd Combat Engineer Regiment. He was deployed to Afghanistan and force assigned as a high-risk searcher within Mentoring and Reconstruction Task Force 2.

During Operation TUFANI BABAR, a battle-group level operation in the Baluchi Valley in Afghanistan, Sapper Conlon's section was supporting 1 Platoon, Combat Team - Alpha. On 7 July 2009, his section was leading 1 Platoon's advance north along Route 62, providing mobility support with dismounted route search. During the patrol, 3 Section was involved in a significant improvised explosive device strike which detonated under the front wheel stations of the Protected Mobility Vehicle. At the time of the strike, Sapper Conlon was dismounted and searching a vulnerable point in front of the lead vehicle. After the initial shock of the explosion, he immediately started to search back along the road towards the damaged Protected Mobility Vehicle. Searching back to the vehicle through clouds of dust was extremely difficult, dangerous and confusing. Metal strewn across the road made searching for secondary explosive devices particularly challenging. It was not possible to see inside the vehicle as the front windscreen was shattered, and the lack of response from his colleagues indicated immediate assistance was required.

Upon entering the Protected Mobility Vehicle it was evident that the Crew Commander and the Driver had sustained serious wounds. As a qualified Combat First Aider, without direction, Sapper Conlon immediately provided life-saving assistance to his wounded colleagues. Concurrently, he mentored a less experienced Combat First Aider, who was also treating the wounded.

Despite having never cannulated a patient, Sapper Conlon successfully did so with the Crew Commander and commenced intravenous therapy treatment prior to the evacuation of the casualties. Under Sapper Conlon's direction, the wounded were stabilised until a casualty handover was conducted to an Advanced Medical Technician. After the wounded soldiers were evacuated from the vehicle, he established a casualty clearance point and continued to perform first aid. Sapper Conlon continued to treat the wounded until the Casualty Evacuation helicopter arrived and he then carried the casualties to the helicopter.

The actions taken by Sapper Conlon in providing first aid treatment and coordination in the Protected Mobility Vehicle and directing the evacuation processes whilst mentoring a less experienced soldier were exemplary. His actions in immediately attending to the welfare of the wounded soldiers of his section clearly demonstrated exceptional presence of mind in a high-pressure combat situation. His coordinating actions, both at the vehicle and at the casualty clearance point, were superior to those expected of a soldier of his rank, experience and employment.

On 9 August 2009 a US Kiowa helicopter launched two Hellfire thermobaric missiles against, and hit, four people observed travelling on two motor bikes on a dirt road through the dasht near Chora and who were suspected of being Afghani combatants emplacing IEDs.

As part of Operation GRAM GHAR, Sapper Conlon was in a Protected Mobility Vehicle as part of a section that, being the closest search team to the incident scene, was dispatched with a view to ensuring that it was clear of any residual IED. When the vehicle reached a point at which it was considered unsafe to proceed further without a clear lane having been identified by use of metal detectors, he and another were directed by the search team commander to find that clear lane. He and the other soldier were chosen for this task over others who could have used the metal detector because they were each also trained in Combat First Aid. In this way, if survivors of the Kiowa attack were found, they could be provided with first aid while placing the minimum number of ADF personnel at risk.

Sapper Conlon proceeded ahead of the other soldier and the search team commander followed after them. Sapper Conlon carefully and thoroughly tested a lane towards the incident site, detecting a number of pieces of metal and examining each to ascertain whether they were debris from the Hellfire missiles, wreckage from the motor bikes, or potentially indicative of an IED. As he got closer to the incident site it became apparent that one and then two of the presumed combatants were still alive. When Sapper Conlon considered that a sufficient path had been cleared to allow access to one of the survivors, he advised the search team commander to direct the team medic to come forward along that path to commence treating that survivor. Sapper Conlon then continued to use his metal detector to search around the

perimeter of the incident site and then progressively inward towards the second survivor and around the two deceased and the wreckage of the motor bikes. When he was satisfied that it was safe to do so, he commended providing first aid to the second survivor who had been gravely injured.

In providing that first aid, Sapper Conlon drew not only on his Combat First Aid training but also enlisted the aid of other unit members (some more senior to him) who had come to the site along the clear lane, to try to encourage the survivor to maintain consciousness, while he administered pain relief and applied dressings.

While the survivor he had treated eventually succumbed to his catastrophic wounds, Sapper Conlon had done all that could reasonably have been expected of him to preserve the life in his care, and had done so at a superior level in horrific circumstances for which his training could not have adequately prepared him. His actions were exemplary and throughout he displayed compassion, dignity, maturity, professionalism, calmness and respect for humanity.

Sapper Conlon's distinguished performance of duty whilst deployed in Afghanistan with Mentoring and Reconstruction Task Force 2 are in keeping with the finest traditions of the Royal Australian Engineers, the Australian Army and the Australian Defence Force.

Decision

149. In light of the above analysis, the Tribunal decided to recommend to the Minister:

- (a) that he not accept the decision that Mr Rohan Conlon not be recommended for the Commendation for Distinguished Service for his actions on 9 August 2009; and
- (b) that he should instead recommend to the Governor-General that the citation for the Commendation for Distinguished Service already awarded to Mr Conlon should be amended (and republished in the Gazette if necessary) along the lines set out in these reasons to expressly recognise those actions.