Australian Government

Defence Honours and Awards Appeals Tribunal

# Rickerby and the Department of Defence [2025] DHAAT 7
# 17 June 2025

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| File Number(s) | 2024/019 |
| Re | **Mr Jeffrey Rickerby**<br>Applicant |
| And | **The Department of Defence**<br>Respondent |
| **Tribunal** | Mr Stephen Skehill (Presiding Member)<br>Major General Mark Kelly AO DSC (Retd)<br>Mr Jonathan Hyde |
| **Hearing Date** | 15 April 2025 |
| **Appearances** | Mr Jeffrey Rickerby<br>Applicant<br><br>Ms Jo Callaghan, Assistant Director, Defence Honours and Awards<br>Department of Defence<br><br>Ms Tiffany Dawes, Specialist Operations and Whole of Government Awards<br>Department of Defence<br><br>Mr Scott Moloney, Directorate of Employment Law and Disability Claims<br>Department of Defence |

**DECISION**

On 10 June 2025, the Tribunal decided to set aside the Defence decisions dated 15 February 2008 and 20 January 2020 that Mr Jeffrey Rickerby not be recommended for the Australian Defence Medal and to substitute for them a recommendation that Mr Rickerby should be awarded the Australian Defence Medal.

**CATCHWORDS**

*DEFENCE AWARD – Australian Defence Medal* – Citizen Military Forces – National Service – termination of national service scheme - eligibility criteria – meaning of qualifying service – meaning of efficient service – leave without pay – grant of leave – exceptional hardship – validity of purported discharge

**LEGISLATION**

*Defence Act 1903* – Part VIIIC – Sections 28, 50C, 110T, 110V(1), 110VB(2), 110VB(6), 128

*Defence Act 1965* – Section 16 (amends Section 50C of the Principal Act)

*Defence Regulation 2016*, Regulations 12, 18, 33, 36

*National Service Act 1951,* Sections 27, 34, 35.

*National Service Act 1968,* Section 35B.

*National Service Termination Act 1973,* Section 4

*Acts Interpretation Act 1901,* Section 15

**Australian Defence Medal**

*Australian Defence Medal Regulations Letters Patent*, *Commonwealth of Australia Gazette S48,* dated 30 March 2006

*Australian Defence Medal Regulations Amendments of Letters Patent Commonwealth of Australian Gazette G00629,* dated 5 August 2020

*Australian Defence Medal Regulations Determination 2021,* dated 16 March 2021

## REASONS FOR DECISION

### Introduction

1. The Applicant, Mr Jeffery Rickerby, seeks review of the decision of Defence, dated 15 February 2008, to refuse to recommend him for the Australian Defence Medal.[1]

### Decision under review

2. On 26 April 2007, Mr Rickerby applied to Defence for an assessment of his eligibility for the Australian Defence Medal. On 15 February 2008, Defence advised Mr Rickerby that he was ineligible for the Australian Defence Medal, for the following reasons:

> *An examination of your service records confirms that you commenced national service on 19 April 1972 and discharged on the ground of exceptional hardship on 15 January 1973. The obligation for national service after 8 October 1971 was 18 months full-time service and five years part-time service for those serving in the Citizen Military Forces.*
>
> *On 5 December 1972, the Australian Government suspended the operation of the national service scheme by administrative action. At this time, national servicemen had the option to discharge at their own request or continue service to complete their service obligation.*
>
> *On 23 April 2007, the Chief of the Defence Force exercised his power under the ADM Regulations to determine effective service for national servicemen for the purposes of the ADM. Under this ADM Determination, a member must complete service of no less than a minimum of 18 months full-time or five years part-time service to qualify for the medal.*
>
> *Therefore, as you did not meet the above criteria, I regret to advise that you do not qualify for the ADM.*[2]

3. A subsequent decision to the same effect was made on 20 January 2020.[3]

4. On 22 October 2024, Mr Rickerby made application to the Tribunal seeking review of the earlier decision. Defence agreed at the hearing that this second decision was equally within the scope of the application for review lodged by Mr Rickerby.

### Tribunal jurisdiction

5. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence award in response to an application. Regulation 36 of the *Defence Regulation 2016* lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 is the Australian Defence Medal. Therefore, the Tribunal has jurisdiction to

[1] Application for review, Mr Jeffery Rickerby, dated 22 October 2024
[2] Letter from Defence to Mr Rickerby, dated 15 February 2008
[3] Letter from Defence to Mr Rickerby, dated 20 January 2020

review decisions in relation to this award.

**Mr Rickerby's service**

6. Mr Rickerby's service record indicates that he enlisted in Australian Regular Army Supplement (National Service) (the ARAS NS) for a period of 18 months on 19 April 1972 and was discharged at the rank of Signalman on 15 January 1973 under section 35(B)(5A) of the *National Service Act 1951* (the National Service Act) *'on the grounds of exceptional hardship'*. Mr Rickerby served for a period of eight months and 28 days.

7. Defence advised that Mr Rickerby has been issued the Anniversary of National Service 1951-1972 Medal for his service.[4]

**The Australian Defence Medal**

8. The Australian Defence Medal was created by Letters Patent and accompanying Regulations on 8 September 2005 *for the purpose of according recognition to Australian Defence Force personnel who have served for a minimum of six years since the end of World War II.*

9. New Regulations were made on 20 March 2006, which resulted in the minimum period of service being changed from six years to the lesser of the period of initial enlistment or four years, unless certain exceptions were applicable. The Regulations were further amended in 2020 to introduce additional exceptions for the award of the Australian Defence Medal to members who had not met the minimum period of qualifying service.

10. Accordingly, the current eligibility criteria for awarding the Australian Defence Medal are contained in paragraph 4(1) of the *Australian Defence Medal Regulations 2006* as amended in 2020, which states:

*4 Award of the Medal*

*(1) The Medal may be awarded to a member, or former member, of the Australian Defence Force who after 3 September 1945 has given qualifying service that is efficient service:*

*a) by completing an initial enlistment or appointment period; or*

*b) for a period of not less than 4 years service; or*

*c) for periods that total not less than 4 years; or*

*d) for a period or periods that total less than 4 years, being service that the member was unable to continue for one or more of the following reasons:*

*(i) the death of the member during service;*

*(ii) the discharge of the member as medically unfit due to a compensable impairment;*

*(iii) the discharge or termination of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the*

[4] Defence Report, dated 6 December 2024

*Defence Force;*

*(iv) the member ceased service in the Permanent Force or Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant factor.* […][5]

11. The *Australian Defence Medal Determination 2021* dated 16 March 2021 (the Determination) provides specific details of prevailing discriminatory policy for the purpose of subparagraph 4(1)(d)(iii) of the Regulations.

> *For subparagraph 4(1)(d)(iii) of the Regulations, policies relating to the following topics that were in effect before the specified dates are determined to be prevailing discriminatory Defence policies:*
>
> *a) Transgender - before 1 June 2010.*
> *b) Homosexuality - before 24 November 1992.*
> *c) Pregnancy (female) - before 7 January 1975.*
> *d) Marriage (female) - before 1 January 1970.*
> *e) Retention after marriage (female) - before 21 March 1984.*

12. Relevant to Mr Rickerby's period of service, Australian Defence Medal Regulation 4(2) as in force at the time of each of the decisions under review provided that the Chief of the Defence Force (CDF) *may determine that a period of the member's qualifying service is efficient service.* Pursuant to that Regulation, the CDF made a determination on 4 September 2007 which designated *not less than a minimum period of 18 months full-time national service, or five years part-time national service, commencing on or after 4 June 1971, as efficient service for the award of a medal to members or former members of the Defence Force who qualify for the award of the medal under section 4 of the regulations.*

**Mr Rickerby's application to the Tribunal**

13. In his application to the Tribunal, Mr Rickerby stated that as a result of a change of government on 7 December 1972, he believed that he had fulfilled his National Service obligation.

> *I was a National Serviceman for the period 19/4/1972 to 15/1/1973. At the time of my enlistment, I was to serve a period of 18 months, but as a result of the change of Government policy on the 7th December 1972, I was sent home a week later.*
>
> *I was later advised to report to Watsonia Barracks on the 15th January 1973 and was given an opportunity to complete service, sign on as a regular or leave. I believed, at the time, that all three offers where [sic] options but the underlying fact was that I had completed my National Service under changed circumstances.*
>
> *Later when I received the discharge document, I was horrified to read that I was discharged on the grounds of exceptional hardship. Now no one advised me on the day of discharge that I would be discharged under this circumstance (what a disgrace)…*

[5] *Commonwealth of Australia Gazette, G00629,* of 4 August 2020, *Australian Defence Medal Regulations, Amendment of Letters Patent by Governor-General,* dated 13 July 2020.

*I was not fully informed by the army and/or my superiors at the time as to the consequences if I did not complete the service period…In hindsight if I was properly briefed, I would have completed my service.*

*I am firmly of the view that we (Nashos) were (and still are) seen as an embarrassment that we have been further humiliated by discrimination in recognising that we 'did' serve our country regardless of the period…In the enclosed letter…on the 23rd of April 2007 (some 34 years later) a retrospective determination was made to in fact prevent the awarding of an ADM to a Nasho who had not completed 18 months.*

*I wish to appeal the decision to not award an ADM on the basis that the non-awarding of such is discriminatory to men who in the last years of National Service who were discharged early in the honest belief that their National Service term had ended on the day of discharge.* [6]

**The Defence report**

14. In its report, Defence reaffirmed its original position that Mr Rickerby was not eligible for the Australian Defence Medal because he did not complete his initial enlistment or appointment period of 18 months and because he did not discharge under the provisions of subparagraphs 4(1)(d) of the Australian Defence Medal Regulations.

15. Defence acknowledged that, in his appeal to the Tribunal, Mr Rickerby stated that had he been fully informed of the consequences of early termination at the time, he would have completed his service. However, Defence pointed out that the Australian Defence Medal was only introduced in 2006, as a result Mr Rickerby's superiors could not have informed him of consequences relating to his medallic entitlement at the time of his discharge in 1973.

16. Defence explained that when the Whitlam Government was elected in December 1972, it immediately implemented an administrative action that gave National Servicemen a choice to leave the Army or to continue to serve. It said this administrative action was *not yet supported by formal legislation* and had to be implemented within the provisions of the extant National Service Act. To enable a discharge at the earliest possible date, Defence submitted that the most expedient mode of discharge at the time was under Section 35(B)(5A) of the National Service Act on the grounds of exceptional hardship. Defence explained that for this purpose, separating from the services under 'exceptional hardship' was a voluntary form of discharge, used to expedite the discharge process, not a reflection of an individual's circumstances.

17. Defence submitted that Mr Rickerby's service records show that, on 11 December 1972, he signed the Pro Forma for Election, choosing option c., *applying for two years leave without pay on grounds of exceptional hardship and seeking earliest possible discharge*. Mr Rickerby then proceeded on leave without pay on 3 January 1973 and action was taken to enable Mr Rickerby's earliest possible discharge, which occurred on 15 January 1973.

18. Defence further advised that, in 2019, Mr Rickerby submitted a further application to Defence, this time seeking that it amend his reason for discharge and re-issue a certificate of service because he considered that the extant discharge reason was erroneous and

[6] Application for Review, Mr Jeffrey Rickerby, dated 22 October 2024

factually incorrect. On 28 June 2023, Defence responded to Mr Rickerby, confirming that it considered that the original discharge reason was the most suitable reason open to a delegate under the governing Act at that time and that Mr Rickerby's original discharge reason remained extant.

19. In his application for an amendment to his discharge reason, Mr Rickerby made comment that he was awarded the Australian National Service Medal for having completed his National Service obligation, citing two documents which he attached to his request as evidence of that completion. Defence stated that the first document was information pertaining to the Australian National Service Medal extracted from the Defence website, and that the second document was a direct copy of Defence's website information re-published on the website of the National Servicemen's Association of Australia. Defence stated that its website is currently under review and that, as part of this review, *the ANSM pages may be amended, because the information is incomplete and as a result the website content may be misleading.*

20. In its report to the Tribunal, Defence also sought to clarify a 2016 letter sent from the Director Honours and Awards to the Pyrenees Shire Council in relation to Mr Rickerby's entitlement to awards, which Defence submitted contained a statement *which may be misleading*. The letter had stated that Mr Rickerby received the Australian National Service Medal *as he completed his obligation under the National Service Act 1951.* Defence clarified that, for the purposes of the Australian National Service Medal, Mr Rickerby met the qualifying criteria for that award which make specific allowance for those who were discharged on the grounds of exceptional hardship.

21. In his application to the Tribunal Mr Rickerby had referred to a Determination, which he said had been *made to in fact prevent the awarding of the ADM to a Nasho who had not completed 18 months.* Defence explained that, at the time of Mr Rickerby's application for the Australian Defence Medal in 2008, a Chief of the Defence Force National Service Determination existed under the Australian Defence Medal Regulation 4(2) which specified that national servicemen who enlisted on or after 4 June 1971 must complete service of no less than a minimum of 18 months full-time or five years part-time service to qualify for the medal.

22. Defence explained that for the purposes of Australian Defence Medal Regulation 4(1)(a-c), all members were required to complete their initial period of enlistment or appointment, or periods that amount to four years' service. By specifying five years part-time service for qualification for the Australian Defence Medal, the Chief of the Defence Force Determination was considered to be erroneous.

23. Defence submitted that an enlistment under the National Service Act, regardless of the date of enlistment, was an initial enlistment or appointment and that a discrete Determination specifying the length of enlistment required for national servicemen to qualify for the Australian Defence Medal was considered unnecessary, because the enlistment periods for national service schemes are specified in the National Service Act. Defence went on to explain that, for the above reasons the Determination made under the Australian Defence Medal Regulation 4(2) pertaining to national servicemen was revoked on 16 March 2021.

**Mr Rickerby's comments on the Defence report**

24. In his comments on the Defence report, Mr Rickerby agreed that he did not complete the requisite 18 month period of service, but submitted that circumstances

changed as a result of a Government decision. Mr Rickerby submitted that national service ended on 2 December 1972 – the date of the election of the Whitlam Government - and that accordingly, he, and others who had prior to that date not completed 18 months of national service should be treated as having completed their period of qualifying service.

25. Mr Rickerby also made a number of other submissions including that he and his colleagues had been denied natural justice as a result of the decision to require an 18 month period of qualifying service for national servicemen for the purposes of the Australian Defence Medal.

## TRIBUNAL ANALYSIS

### Historical background

26. More than 63,000 Australian men were conscripted into the Australian Army during the Vietnam War which was waged from 1962 to 1975 and to which Australia committed troops from 1962 to March 1972.

27. The *Defence Act 1965* amended the *Defence Act 1903* in May 1965 to provide in section 50C that conscripts could be obliged to serve overseas, and in March 1966 the then Prime Minister announced that National Servicemen would be sent to Vietnam to fight in units of the Australian Regular Army.

28. Nearly 16,000 of those 63,000 conscripted served in the war, and over 200 of them died and at least 1,200 were wounded on active duty.

29. The statutory framework for this conscription was the *National Service Act 1951.* The National Service Act required 17-year old males to register and any whose birthdates were drawn from a ballot held twice per year were liable to be conscripted unless they could make out a (very limited) ground for exemption or deferral.

30. The National Service Act originally provided that national service enlistment was for two years of continuous full-time service in the Regular Army Supplement and an additional three years of reserve service in the Regular Army Reserve. However as discussed further below, at the time relevant to this matter, the *National Service Act 1971* had amended these periods to 18 months and three and a half years respectively.

31. The Australian Labor Party led by the Hon Edward Gough Whitlam MP won the 1972 federal election. It had campaigned on a platform that included withdrawing Australian troops from the Vietnam War. On assuming office, it immediately and administratively directed that withdrawal, leaving the Army with many more troops than it required. Currently enlisted national servicemen were therefore offered three options – they could serve out the balance of their enlistment; they could transfer to the Reserve; or they could take early discharge.

32. The *National Service Termination Act 1973* was subsequently passed to formally bring national service to an end. Its terms and effect are discussed in more detail below.

### Mr Rickerby's circumstances

33. Mr Rickerby was born on 8 September 1951. In the fourteenth national service ballot held on 17 September 1971, that date was drawn and he commenced his 18 months'

full-time enlistment in the Regular Army Supplement on 19 April 1972.

34. On 11 December 1972 Mr Rickerby completed a 'Pro Forma for Election' document in which he adopted pre-prepared text which stated that he applied for two years leave without pay on the grounds of exceptional hardship and sought the earliest possible discharge.

35. On the same day, he completed a 'Form of Indemnity' in which he adopted text that stated that, *In consideration of my being permitted to commence civilian employment during a period of Leave Without Pay taken by me notwithstanding the fact, which I acknowledge, that my period of national service obligation has not expired and that I am still subject to military law*. He provided certain indemnities to the Commonwealth.

36. Mr Rickerby's Record of Service shows that he proceeded on leave without pay on 3 January 1973 and that that leave ceased 12 days later at the end of 14 January 1973.

37. An Interim Discharge Certificate dated 8 March 1973 was issued by a Major described as *OC S Cmd Personnel Depo*. It stated that discharge had been *duly authorized* by *Southern Command NS DO 9/73* on 11 January 1973 and listed the reason for discharge as *Discharged on the ground of exceptional hardship* and referenced *NSA 35 B (5A)*.

38. A final Certificate of Discharge issued on 23 March 1973 was signed by a different Major described as *Records Officer, Central Army Records Office*. This latter certificate stated that the reason for discharge was 'exceptional hardship' but cited no authority for discharge.

39. Each of these certificates stated that the date of discharge was 15 January 1973, by which stage Mr Rickerby had served 272 days or around half of his 18-month enlistment period.

40. After 15 January 1973 the Army required Mr Rickerby to render no further service in the Regular Army Supplement or the Regular Army Reserve.

41. As noted above, the Australian Defence Medal was created on 8 September 2005 and the Australian Defence Medal Regulations relevantly provided that it could be awarded to a member or former member of the Defence Force who had given *qualifying service that is efficient service … by completing an initial enlistment period*.

**Mr Rickerby's eligibility for the Australian Defence Medal**

42. Mr Rickerby applied for the Australian Defence Medal on 26 April 2007 but his application was refused by Defence on 15 April 2008 on the basis that he had not served the minimum qualifying period of 18 months because he had been discharged after serving only 272 days. Various representations made by him or on his behalf and a further application he made on 25 November 2019 were all rejected on the same basis.

43. Whether Mr Rickerby meets the eligibility criteria for the Australian Defence Medal requires consideration of a number of key concepts:

- What is qualifying service;
- What is eligible service;
- What is an initial enlistment period;
- What constitutes completion of such a period.

44. Integral to each of the decisions rejecting the applications made by Mr Rickerby is the question of whether or not Mr Rickerby was validly discharged.

**Power to discharge**

45. It is abundantly clear that the legal authority relied on for his discharge was section 35B(5A) of the National Service Act, which was inserted by the *National Service Act 1968.* The full text of section 35B as so amended was as follows:

> *(1.) A national serviceman shall not be discharged, dismissed or removed from the force in which he is serving before the expiration of the period of his engagement to serve in that force, except in accordance with a sentence of a service tribunal or as provided by this section or by section twenty-seven or section twenty-eight of this Act.*
>
> *(2.) Where, in accordance with conditions determined by the Military Board, a national serviceman is found to be medically unfit for further service in the force in which he is serving, he may be discharged from the Military Forces.*
>
> *(3.) Where, in the opinion of the Military Board or a person authorized by the Military Board, a national serviceman is unsuitable for further service in the Military Forces and should, for that reason, be discharged, he may be discharged from the Military Forces.*
>
> *(4.) Whenever a national serviceman is discharged under the last preceding sub-section on disciplinary grounds, the Military Board or authorized person shall so state in writing.*
>
> *(5.) Whenever it is found that a national serviceman has become exempt from liability to render service under this Act, he shall be discharged from the Military Forces.*
>
> *(5A) Where-*
>
> *(a) a national serviceman has been granted leave without pay for periods amounting in the aggregate to not less than two years on the ground that the rendering of the service that he was liable to render under this Act was imposing or would impose exceptional hardship on him or on his parents or dependents; and*
>
> *(b) the Military Board, or a person authorized by the Military Board, has no reason to believe that the circumstances that led to the grant of leave will not continue and is satisfied that the national serviceman should, for that reason, be discharged, the national serviceman may be discharged from the Military* Forces *and may be so discharged on the ground of exceptional hardship.*
>
> *(6.) Where the Military Board or a person authorized by the Military Board is satisfied that a national serviceman-*
>
> *(a) will, if he is discharged under this sub-section, be enlisted in the Permanent Forces, the naval, military or air forces of any part of the*

*Queen's dominions other than Australia, or the naval, military or air forces of a prescribed country; and*

(b) *will, upon being so enlisted, be liable to serve in the force in which he enlists for a period that is not less than the unexpired portion of the period of his engagement to serve in the Regular Army Supplement or the Regular Army Reserve, as the case may be, he may be discharged from the force in which he is serving as from the day immediately preceding the day on which he is so enlisted in a force referred to in paragraph (a) of this sub-section.*

*(7.) A national serviceman discharged in accordance with a sentence of a service tribunal or as provided by this section is not liable to render further service under this Act.*[7]

46. There was no other provision on which reliance could have been placed to discharge Mr Rickerby (or any of the other national servicemen who similarly opted for early discharge).

**Questions raised by the Tribunal**

47. At the hearing on 15 April 2025, the Tribunal raised with the Defence representatives a number of issues concerning the validity of the purported discharge of Mr Rickerby under section 35B(5A) and, if it was not legal, whether it was validated by the *National Service Termination Act 1973*. The Defence representatives sought leave to take those questions on notice in order to provide a fully considered written response and the Tribunal readily agreed to that. At Defence's request, the Tribunal reduced its questions to writing. They were as follows:

1. *Was the purported discharge of Mr Rickerby on 15 January 1973 under section 35B(5A) of the National Service Ac t 1951 legally valid? If so, why?*

2. *Was it legally possible for Mr Rickerby to be given leave without pay for a period that extended beyond the term of his then-current enlistment? If so, why?*

3. *Was it legally possible for Mr Rickerby to be discharged under section 35B(5A) after the grant of leave without pay but before the expiry of at least 2 years of such leave? If so, why? In this regard, attention is drawn to the following extract from the Second Reading Speech for the National Service Bill 1968 which was introduced to amend section 35B of the National Service Act 1951 by inserting section 35B(5A):*

   *"As honourable members know, the present legislation provides for the deferment of the liability to render service on grounds of exceptional hardship. Where a person is passed fit for service and the rendering of service would impose exceptional hardship on him, his parents or dependants he may seek temporary deferment of call-up and the courts are empowered to grant deferment for successive periods not exceeding 12 months. Honourable members will be aware of cases where it is evident that the circumstances have not changed, and are unlikely to change, from year to year and to require a*

[7] National Service Act, Section 35B, Amendments assented to 24 June 1968 vide Statutory Rule No 51 of 1968

*registrant and his family to return to the court each year to seek deferment on the same grounds could be harsh and is surely unnecessary.*

*The Government has decided, therefore, that where a national service registrant has been deferred by the courts for not less than 2 years in total on the ground that the rendering of service would impose exceptional hardship on him, his parents or dependants and at the end of the 2 years my Department has no reason to believe that the circumstances which led to the grant of leave will not continue, the registrant will be granted indefinite deferment and in present circumstances will not be called up for service. The same approach will be adopted in respect of serving men. Where men have been granted leave without pay from the Army for not less than 2 years in total they will, subject to my Department being satisfied as to the continuation of the circumstances, be discharged without further liability for service.*

*While my Department will take a not unsympathetic view of cases which come before it for review, I want to emphasise that all registrants granted deferment on the grounds of exceptional hardship will have had the opportunity of gaining indefinite deferment from national service by undertaking to serve in the Citizen Forces including, where appropriate, the CMF special units which were formed specifically to provide the opportunity for all men to elect to serve in the Citizen Forces. If young men do not take advantage of this option there should be good and compelling reasons to warrant the granting of what is, in effect, exemption from service."*

4. *Was there any inquiry made as to whether continuing service by Mr Rickerby would impose exceptional hardship on Mr Rickerby or his family? If so, please provide evidence of that inquiry?*

5. *Was there any evidence that continuing service by Mr Rickerby would impose exceptional hardship on Mr Rickerby or his family? If so, please provide that evidence?*

6. *Was any such evidence considered by the Military Board or a person authorised by the Board? If so, please provide documentation confirming that consideration?*

7. *Which person authorised Mr Rickerby's discharge? Under what delegation or other authorisation did that person have to take that decision?*

8. *If the purported discharge of Mr Rickerby under section 35B(5A) was not in compliance with the requirements of that section, was it thereby legally ineffective? If so, did Mr Rickerby remain an enlisted member after 15 January 1973, albeit on leave without pay? If not, why?*

9. *Did section 4(1) of the National Service Termination Act 1973 have the effect of validating any discharge in purported but wrongful reliance on section 35B(5A)? If so, why?*

10. *If that section of that Act did not validate such discharge, did Mr Rickerby remain an enlisted member until the end of his initial enlistment period of 18 months, albeit on leave without pay? If so, did he thereby meet the eligibility requirements of regulation 4(1)(a) of the ADM Regulations as affected by the CDF determination of 4 September 2007 made under regulation 4(2)? If not,*

*why not?*

11. *What was the purpose and effect of section 4(2) of that Act? Did it mean anything other than service by Mr Rickerby after 5 December 1972 was to be regarded as part of his National Service Act engagement notwithstanding that section 4(1) provided that he was not liable to render that service? If so, what meaning is to be attributed to section 4(2)? Did section 4(2) have any effect on Mr Rickerby beyond 3 January 1973 when he commenced leave without pay? If so, what was that effect?*

12. *Alternatively, does section 4(2) of the National Service Termination Act 1973, in its operation and effect, deem Mr Rickerby to have completed 18 months' service in the Regular Army Supplement? If yes, why would he not have an entitlement to an ADM having been deemed to have completed his full period of service?*

48. Defence provided its written response to those questions on 15 May 2025. Defence advised that its response had been prepared with advice and assistance from the Australian Government Solicitor. The Tribunal appreciated the timeliness and thoroughness of the Defence response which, while not agreeing with all it said, it found to be of considerable assistance in its consideration of Mr Rickerby's application for review. The Tribunal wished to take this opportunity to thank both Defence and the Australian Government Solicitor for all the effort that had evidently gone into preparing the written response.

49. The Defence response was provided to Mr Rickerby to afford him an opportunity to comment if he so wished. Mr Rickerby responded on 3 June 2025. He again pointed to his individual circumstances and those of other national servicemen of the same age. He contended that his discharge was not in accordance with Section 35B of the National Service Act, and resubmitted that as soon as the Whitlam Government was elected it was perceived by him and by his contemporaries that their period of enlistment was at an end.

**Jurisdiction of the Tribunal to consider the validity of Mr Rickerby's discharge**

50. In its written response, Defence argued that the Tribunal did not have jurisdiction to consider the validity of Mr Rickerby's discharge. It said:

> *14. Respectfully, the jurisdiction of this Tribunal does not include reviewing a decision under s 35B(5A) of the NS Act. The decisions the Tribunal may review are those identified in s 110V(1) of the Defence Act 1903 (Cth). The powers and functions of the Tribunal in conducting such a review are those identified in s 110VB. These include that the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision (s 110VB(6)). Under those eligibility criteria, the only relevant inquiry into a member's discharge is as to whether the discharge was:*
>
> *a. 'as medically unfit due to a compensable impairment' (s 4(1)(d)(ii) of the Australian Defence Medal Regulations 2006); or*
>
> *b. due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force or their delegate (s 4(1)(d)(iii)); or*
>
> *c. whether the member ceased service where mistreatment by a member of the Defence Force or Department of Defence was a significant contributing factor (s 4(1)(d)(iv)).*

*15. The appropriate course is for the Tribunal to proceed on the basis that the discharge occurred and remains legally effective.*

*16. This is consistent with the approach of the Tribunal in Martin and the Department of Defence [2020] DHAAT 20. This matter concerned a National Serviceman who was discharged under essentially the same circumstances and on the same basis as Mr Rickerby.1 The Tribunal concluded that it had no discretion to go outside the eligibility criteria to recommend the award of the Australian Defence Medal in these circumstances (particularly at [19] – [20]).*

*17. This is also consistent with the approach of the Administrative Appeals Tribunal in Burgess v Repatriation Commission [2013] AATA 645. This matter also concerned a National Serviceman who was discharged under essentially the same circumstances and on the same basis as Mr Rickerby. The applicant in that matter sought entitlements under the Veteran's Entitlements Act 1986 (Cth), with the issue turning on whether he had completed the period of service for which he was engaged to serve. The applicant in that matter argued that his discharge under s 35B(5A) was illegal because it did not meet the conditions of the subsection (at [10]). The Tribunal concluded, at [17]: Even if the applicant was unaware of his options, and unaware of the loss of benefits that went with early discharge, that is not a matter than can affect my decision. There is no discretion in the Act which allows me to make a finding that but for the applicant's lack of information, he would have completed his 18-month period of service, and is therefore entitled to benefits. Nor is there discretion in the Act which allows me to find a person is entitled to benefits because his discharge prior to the end of the deemed period of service, was illegal. I will however, for the sake of completeness, briefly comment on that issue.*

*18. The Tribunal went on to conclude that the discharge was, in any case, lawful (at [19]).*

*19. Save that in Martin there was evidence from the Applicant about comments made by the Commanding Officer at the time (see [16]–[17]). Mr Martin also signed a pro-forma: [18].*

51. The Tribunal agreed that it did not have any general power to review decisions made under section 35B(5A) of the National Service Act and that its jurisdiction was as specified in section 110V of the *Defence Act 1903*. However, it rejected the proposition that this meant that it could not consider whether or not a decision made under section 35B(5A) was valid so as to affect eligibility for the Australian Defence Medal.

52. Clearly, the Tribunal does have jurisdiction to review decisions to refuse to recommend grant of the Australian Defence Medal. In so doing, it clearly is required to consider whether the eligibility criteria for the Australian Defence Medal have been met. Those criteria clearly include the requirement that a period of qualifying service that is eligible service has been completed. Where an Australian Defence Force member has been discharged prior to the conclusion of that period, the question of whether or not that discharge resulted in effective termination of service is inherently involved.

53. In the view of the Tribunal, it is not precluded from looking behind a Defence assertion that discharge did result in termination and can consider whether or not Defence is correct in making that assertion. To simply accept such an assertion would be an abrogation of the fundamental duty of the Tribunal to consider whether or not the decision

under review was sound in law and the correct or preferable decision.

54. Accordingly, the Tribunal rejected the proposition that it can only inquire into the matters listed in Australian Defence Medal Regulation 4(1)(d) – clearly it can (and indeed must) inquire into the other core eligibility criteria set out in Regulation 4(1).

55. The Tribunal also considered that neither of the cases cited by Defence in the above passage provided any support for the proposition that it could not consider the validity of a discharge.

56. In *Martin and the Department of Defence [2020] DHAAT 20* the Tribunal expressly proceeded on the basis of facts agreed between the applicant and Defence. These included that the applicant had been discharged. The only issues considered by the Tribunal were specifically stated to be: whether the applicant had completed his initial enlistment period or four years in the Australian Regular Army Supplement (National Service); whether he was unable to complete four years' service for any of the reasons set out in Regulation 4(1)(d); and whether the Tribunal had the power or discretion to disregard the Australian Defence Medal Regulations and to award the Australian Defence Medal. The question of whether or not the discharge of the applicant was valid was not a matter considered by the Tribunal.

57. In *Burgess v Repatriation Commission [2013] AATA 645* the validity of Mr Burgess' discharge under section 35B(5A) was challenged, but only on the limited bases that there was no evidence that his application for leave without pay had been granted, and that it should not have been granted as Mr Burgess was not suffering from extreme hardship. The Administrative Appeals Tribunal concluded that the application for leave without pay had in fact been granted, but did not consider whether or not there was any extreme hardship. Rather, the Tribunal decided the matter on the basis that the form of indemnity signed by Mr Burgess did not indicate that he had completed his service. Again, the question of whether or not the discharge of the applicant was valid was not a matter considered by that Tribunal.

58. Having satisfied itself that it was able to consider the validity of Mr Rickerby's discharge, the Tribunal then proceeded to do so as outlined below.

**Two years leave without pay**

59. At the time of the events relevant to this matter, Mr Rickerby was approximately half-way through his 18-month period of full-time service in the Regular Army Supplement and had not rendered any service in the Regular Army Reserve.

60. Therefore, the Tribunal was concerned as to whether the Army could have legally approved two years' leave without pay or whether, instead, it could only have approved such leave for the remaining balance of the 18-month period. If it could not have approved two years' leave without pay, then discharge under section 35B(5A) would not have been an option.

61. The view of Defence was that the Army did have the power to approve two years' leave without pay notwithstanding that that period extended beyond the period of 18 months full-time service for which Mr Rickerby was conscripted.

62. At the relevant time, section 27 of the National Service Act provided as follows:

*(1.) A person on whom a notice has been served under the last preceding section shall, upon presenting himself for service, be deemed to have been enlisted for service in the Regular Army Supplement and to have been engaged to serve in that force for a period of eighteen months.*

*(2.) Upon his completion of the period of service in the Regular Army Supplement for which, under the last preceding sub-section, a person is to be deemed to have been engaged, he shall, subject to the succeeding provisions of this section and the next succeeding section—*

*(a) be discharged from that force; and*
*(b) upon being so discharged, be deemed to have been enlisted for service in the Regular Army Reserve and to have been engaged to serve in that force for a period of three and one-half years.*

*(3.) If the period of service for which—*

*(a) a person is to be deemed to have been engaged or re-engaged to serve in the Regular Army Supplement; or*
*(b) a person is to be deemed to have been engaged to serve in the Regular Army Reserve,*

*expires during a time of war, he shall, upon his completion of that period, be deemed to have been re-engaged to serve in that force for the duration of the time of war.*

*(4.) If the period of service in the Regular Army Supplement for which, under this section, a person is to be deemed to have been engaged or re-engaged expires during a time of defence emergency, he shall, upon his completion of that period of service, be deemed to have been re-engaged to serve in that force for the duration of the time of defence emergency or until the expiration of the period of five years after the date on which he presented himself for service under this Act, whichever is the shorter period.*

*(5.) If, upon or before the expiration of the period of his engagement to serve in the Regular Army Supplement, a national serviceman volunteers and is accepted for an additional period of service in that force, he shall be deemed to have been re-engaged to serve in that force for the additional period.*

*(6.) Where, as provided by the preceding provisions of this section, a national serviceman has served in the Regular Army Supplement for a period of not less than five years, he is not liable to render further service under this Act.*

*(7.) Where, as provided by the preceding provisions of this section, a national serviceman has served in the Regular Army Supplement for a period of less than five years, he shall, subject to the succeeding provisions of this section and the next succeeding section—*

*(a) upon his completion of that period of service be discharged from that force; and*

*(b) upon being so discharged, be deemed to have been enlisted for service in the Regular Army Reserve and to have been engaged to serve in that force for the period by which the period of five years exceeds the period for which he served in the Regular Army Supplement.*

*(7a.) A national serviceman who is serving in the Regular Army Supplement under a re- referred to in sub-section (5.) of this section may be discharged from that force in accordance with regulations under the Defence Act 1903-1966 but, upon being so discharged, he shall, subject to the succeeding provisions of this section and the next succeeding section, be deemed to have been enlisted for service in the Regular Army Reserve and to have been engaged to serve in that force for the period by which the period of five years exceeds the period for which he served in the Regular Army Supplement.*

*(8.) If, upon or before the expiration of the period of his engagement to serve in the Regular Army Supplement, a national serviceman volunteers and is accepted for service, after his discharge from that force in—*

*(a) the Regular Army Emergency Reserve for a period of not less than four years; or*
*(b) the Active Citizen Military Forces for a period of not less than three and one-half years,*

*he is not liable to render further service under this Act except as provided by the next succeeding sub-section.*

*(9.) Where a person referred to in the last preceding sub-section, having enlisted in the Active Citizen Military Forces, fails to render efficient service in that force as provided by regulations in force under the Defence Act 1903-1965, he shall be discharged from that force and, upon being so discharged, shall be deemed to have been enlisted in the Regular Army Reserve and to have been engaged to serve in that force for the period by which the period of five years exceeds the total period of his service in the Regular Army Supplement and in the Active Citizen Military Forces.*

*(10.) If, at the date of the expiration of the period of his engagement to serve in the Regular Army Supplement, a national serviceman is absent from duty on account of an illness or injury in circumstances in which, under regulations in force under the Defence Act 1903-1965, he would be eligible, if he were retained in that force, to be paid for service, he may, with his consent, be retained in that force for the period for which he is so absent from duty and, if he is so retained, shall be deemed to have been re-engaged to serve in that force for that period.*[8]

63. It is apparent from the terms of section 27 that national service involved two quite separate periods of enlistment – one in the Regular Army Supplement and another in the Regular Army Reserve – and that a statutory discharge separated the two. The second arose only after the first was concluded. The entirety of service in the Regular Army Supplement was paid, unless on leave without pay. Service in the Regular Army Reserve was unpaid unless duty was specifically required.

[8] National Service Act 1951-1971, as amended by Statutory Rule No. 80 of 1971, 8 October 1971

64. However, Defence drew the Tribunal's attention to section 34 of the National Service Act which provided as follows:

> ***Calculation of service in the Regular Army Supplement***
>
> *(1) In calculating the period for which a national serviceman is to be deemed to have been engaged to serve in the Regular Army Supplement, account shall not be taken of any period during which he–*
>
> *[… ]*
>
> *(d) was absent from duty on leave without pay for a period in excess of twenty-one days.*
>
> *[… ]*
>
> *(2) The period for which a national serviceman is to be deemed to be engaged to serve in the Regular Army Supplement shall be deemed to be increased by a period equal to any period that is not to be taken into account under the preceding provisions of this section.*
> *(3)* [9]

65. The Tribunal agreed that this provision necessarily meant that leave without pay could be granted for a period that extended beyond the then-current enlistment period.

**The 'grant' of leave**

66. Having concluded that the Army had the power to grant Mr Rickerby leave without pay for a period extending beyond the remainder of his 18-month enlistment period, the Tribunal then considered whether doing so would constitute a 'grant' for the purpose of section 35B(5A).

67. The Defence response to the question *Was it legally possible for Mr Rickerby to be discharged under section 35B(5A) after the grant of leave without pay but before the expiry of at least 2 years of such leave?* was as follows:

> *9. Yes.*
>
> *10. This is consistent with the language of s 35B(5A). Paragraph 35B(5A)(a) referred to where a National Serviceman '…has been **granted** leave…'. Similarly, s 35B(5A)(a) refers to '…the **grant** of leave…'. The condition precedent is expressly referring to the grant of leave.*
>
> *11. This is consistent with the extract of the second reading speech referred to by the Tribunal, which also refers to the grant of leave (and makes no reference to whether that leave has been completed):*
>
> *'The same approach will be adopted in respect of serving men. Where men have been **granted** leave without pay from the Army for not less than 2 years in total they will, subject to my Department being satisfied as to the continuation of the circumstances, be discharged without further liability for service'.*

[9] Ibid.

*12. To read into s 35B(5A) a requirement that the National Serviceman had completed the entire period of any leave granted to them would require substantial surgery to the provision. Paragraph 35B(5A)(a) would need to refer to the National Serviceman both being granted leave, and having completed that leave. There is no basis to imply such words into the text of the provision.*

*13. This is consistent with how the Administrative Appeals Tribunal applied s 35B(5A) in brief comments made in Burgess v Repatriation Commission [2013] AATA 645, [19] (discussed further below at [178]–[189]).*

68. The Tribunal found this argument to be unconvincing on a number of bases:

- simply noting that contemporaneous documents used the word "grant" does not address the issue of what that word was intended to mean in the context in which it was used;

- the limited extract from the Second Reading Speech relied upon by Defence was selective and taken out context because, when read in its entirety, the Second Reading Speech does not support the view that "grant" simply meant "approve"; and

- this issue was in no way addressed in the case of *Burgess*.

69. It appeared to the Tribunal that if the Parliament had intended to give a power to discharge upon the ground of exceptional hardship at any time of the Army's choosing, it would have been strange and even manifestly absurd to impose as a pre-condition an obligation to give prior approval for leave without pay for an entirely notional period during which such leave was not intended to be taken.

70. In these circumstances the Tribunal concluded that the meaning of the word 'granted' in section 35B(5A), viewed in its terms in isolation, was ambiguous or obscure.

71. The *Acts Interpretation Act 1901* provides as follows:

***15AB Use of extrinsic material in the interpretation of an Act***

*(1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:*

*(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or*

*(b) to determine the meaning of the provision when:*

*(i) the provision is ambiguous or obscure; or*

*(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.*

*(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:*

*(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer;*

*(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted;*

*(c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted;*

*(d) any treaty or other international agreement that is referred to in the Act;*

*(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted;*

*(f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House;*

*(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and*

*(h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament.*

*(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to:*

*(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and*

*(b) the need to avoid prolonging legal or other proceedings without compensating advantage.*

72. In reliance on section 15AB(2)(f), the Tribunal therefore looked at the Second Reading Speech for the Bill by which the insertion of section 35B(5A) was proposed in the House of Representatives.

73. As set out in the questions posed to Defence by the Tribunal, that speech contained the following text of relevance:

*As honourable members know, the present legislation provides for the deferment of the liability to render service on grounds of exceptional hardship. Where a person is passed fit for service and the rendering of service would impose exceptional hardship on him, his parents or dependants he may seek temporary deferment of call-up and the courts are empowered to grant deferment for successive periods not exceeding 12 months. Honourable members will be aware of cases where it is evident that the circumstances have not changed, and are unlikely to change, from year to year and to require a registrant and his family to return to the court each year to seek deferment on the same grounds could be harsh and is surely unnecessary.*

*The Government has decided, therefore, that where a national service registrant has been deferred by the courts for not less than 2 years in total on the ground*

*that the rendering of service would impose exceptional hardship on him, his parents or dependants and at the end of the 2 years my Department has no reason to believe that the circumstances which led to the grant of leave will not continue, the registrant will be granted indefinite deferment and in present circumstances will not be called up for service. The same approach will be adopted in respect of serving men. Where men have been granted leave without pay from the Army for not less than 2 years in total they will, subject to my Department being satisfied as to the continuation of the circumstances, be discharged without further liability for service.*

*While my Department will take a not unsympathetic view of cases which come before it for review, I want to emphasise that all registrants granted deferment on the grounds of exceptional hardship will have had the opportunity of gaining indefinite deferment from national service by undertaking to serve in the Citizen Forces including, where appropriate, the CMF special units which were formed specifically to provide the opportunity for all men to elect to serve in the Citizen Forces. If young men do not take advantage of this option there should be good and compelling reasons to warrant the granting of what is, in effect, exemption from service.*[10]

74. It was apparent to the Tribunal from the full text of section 35B (set out above) that discharge from national service was intended to be strictly confined and that those conscripted were to be required to serve their full term except in the most serious or deserving of cases. In the Tribunal's view, this extract from the Second Reading Speech made it clear that, consistently with the position reflected in those other provisions, discharge on the ground of exceptional hardship was to be available only where that hardship was persistent and likely to continue indefinitely.

75. The extract made it clear that the position of discharge of enlisted conscript members was to be dealt with on a basis consistent with that in respect of deferral for those not yet enlisted. In respect of the latter, it was clear that the question was to be considered *at the end of the 2 years.*

76. Accordingly, the Tribunal concluded that the term "granted" in section 35B(5A) was intended to be interpreted as meaning approved and taken, and not simply approved.

77. If that is correct, then the Army did not have the power to discharge Mr Rickerby under that section at the time it purported to do so.

**Exceptional hardship**

78. But, even if that conclusion is incorrect and the Army was able to discharge a person under section 35B(5A) at any time after it had approved two years' leave without pay, the power of discharge under that section required that there be a specified state of affairs.

79. The Tribunal considered that it was self-evident on a plain reading of the terms of section 35B(5A) that hardship justifying discharge under that section had to be:

- exceptional;

[10] Commonwealth, Parliamentary Debates, House of Representatives, 10 May 1965, Second Reading Speech, National Service Bill 1968, introduced to amend Section 35B of the National Service Act 1951

- imposed by the requirement to render national service; and
- imposed on either the national serviceman or their family.

80. Clearly, inconvenience or cost arising to the Army from the continued service of national servicemen surplus to operational requirements was not a ground that could justify discharge under section 35B(5A).

81. There is no evidence on Mr Rickerby's service file of any such hardship. Moreover, at the hearing, Mr Rickerby gave sworn evidence that no such hardship existed at the time for either himself or his family.

82. And, in its written response to the questions posed by the Tribunal, Defence conceded *there was no specific inquiry or evidence relating to the hardship experienced by Mr Rickerby or his family*.

83. The Tribunal concluded that, on this basis alone, the purported discharge under section 35B(5A) was not authorised by section 35B(5A). That is, there was no basis to discharge Mr Rickerby under section 35B(5A) on the ground of exceptional hardship.

**Process requirements**

84. Section 35B(5A) expressly required that, prior to discharge under that section, the Military Board, or a person authorized by the Military Board, had to give consideration to and reach a state of satisfaction about the exceptional hardship of the individual proposed to be discharged, or their family.

85. Section 28 of the *Defence Act 1903* provided that *The Governor-General may appoint a Board of Advice to advise on all matters relating to the Defence Force submitted to it by the Minister*.

86. Section 124 of the Act then provided that the Governor-General could make regulations for *the establishment and composition of a Board of Advice and the convening procedure and powers of the Board*.

87. At the time relevant to this matter, the Australian Military Regulations provided that the Military Board consisted of the following members:

> The Minister of State for the Army (President);
> The Chief of the General Staff (First Military Member and Chairman);
> The Adjutant General (Second Military Member);
> The Quarter-Master General (Third Military Member);
> The Master-General of the Ordinance (Fourth Military Member);
> The Deputy Chief of the General Staff (Fifth Military Member);
> The Citizen Military Force Member; and
> The Secretary to the Department of the Army.

88. Regulation 33(1) provided that:

> *Subject to the provisions of these and any other regulations made under the [Defence Act], the Military Board is charged with the control and administration of all matters relating to the Military Forces, in accordance with the policy directed by the Minister.*

89. However, Regulation 33 (2) provided that:

> *Within the scope of the duties and powers assigned to him under these or any other regulations made under the [Defence Act], each member of the Military Board may individually, and except as mentioned in A.M.R. 29 (4), in his own name, deal with and decide matters which in his opinion are matters of routine, and may delegate his duties and powers under this regulation to his subordinates.*[11]

90. The Military Board was dissolved in February 1976 upon the creation of the Chief of the Defence Force Staff who controlled the Australian Defence Force. In 1984 the position of Chief of the Defence Force Staff was created to take over the administration of the Australian Defence Force.

91. The Defence view was *it is … not possible to identify the specific individual who authorised Mr Rickerby's discharge. In accordance with s 35B(5A), the decision maker would have been either the Military Board, or a person authorised by the Board.*

92. The Tribunal did not accept that it was not possible to identify the specific individual who authorised Mr Rickerby's discharge. As noted above, the Interim Discharge Certificate of 8 March 1973 was issued by a Major described as *OC S Cmd Personnel Depot* and stated that discharge had been *duly authorized* by *Southern Command NS DO 9/73*, and the final Certificate of Discharge issued on 23 March 1973 was signed by a different Major described as *Records Officer, Central Army Records Office*.

93. Moreover, the Tribunal considered the assertion that the decision maker *would have been* the Military Board or a person authorised by the Board could not be accepted with any confidence. It is not unknown that purported decisions are, from time to time, made by persons who do not have the legal authority to make them – indeed that is a specified ground of challenge in administrative law. There is no evidence on Mr Rickerby's service file that the Military Board or any member of it followed the process of consideration required by section 35B(5A) and, indeed, the text of the Interim Discharge Certificate and the final Certificate of Discharge suggest otherwise.

94. The Tribunal therefore concluded that it was highly likely that the purported discharge of Mr Rickerby was also not authorised for failure to follow the processes prescribed by law and that the person or persons who purported to discharge Mr Rickerby did not have the statutory power to do so.

**Validity at the time of purported discharge**

95. In its written submission, Defence argued that *if the discharge of Mr Rickerby under s 35B(5A) did not meet the requirements of that subsection, it does not follow that the discharge was of no legal effect.*

96. In this regard, Defence referred to various judicial authorities in support of the proposition that not every jurisdictional error on the part of a decision-maker results in invalidity.

97. The key propositions to which it referred were as follows:

[11] Australian Military Regulations and Orders , Statutory Rules 1927, No 149, made under the Defence Act 1903, Regulation 33(2).

*An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.*
*[… ]*

*the 'legal and factual consequences of such a decision will ultimately depend upon the particular statutory provisions pursuant to which the decision has been made'.*

98. and

*This is not to say that a decision under s 35B(5A) could not* [sic] *never have been challenged in a Court on the basis of non-compliance with the section, or that non-compliance could never have given rise to consequences, such as an order in the nature of certiorari to quash such a decision. Rather, it is to say that, absent such a (successful) challenge and a decision of a Court, a decision under s 35B(5A) should not be taken to be a legal nullity on the basis of any assessment that it did not comply with a condition in s 35B(5A). This is particularly where that conclusion may be based on an assessment of how the Military Board (or person authorised by the board) assessed matters which involved broad factual or discretionary judgments.*

99. Accepting that not every jurisdictional error results in invalidity, the question for the Tribunal was whether or not the errors in this particular case had that effect.

100. Of relevance to that question are the following:

- in the view of the Tribunal, the power to discharge was not available at the time at which the purported decision was made, as that power arose only after two years on leave without pay;

- there was no inquiry made or view formed about the key issue that could justify discharge - that is, was there exceptional hardship for Mr Rickerby and his family that was likely to continue; and

- there is no evidence that the person or persons who authorised the purported discharge had the power to do so.

101. These were each quite fundamental problems with the approach taken by the Army. They were not minor lapses of attention to detail or an understandable but incorrect interpretation of an especially complicated provision in the legislation. It should not lightly be concluded that a decision exhibiting these faults was nevertheless legally effective.

102. The Tribunal considered that section 35B(5A) needed to be read:

- in the specific context of section 35B in its entirety;

- in the broader context of those provisions of the National Service Act relating to deferrals and exemptions; and

- in the more general context of the time at which the legislation was passed and applied.

103. At that time, Australia's participation in the Vietnam War, the use of conscription, and the deployment of national servicemen to engage in that war, were highly controversial issues. There was also widespread public debate and controversy about issues such as conscientious objection and other grounds of exemption from national service, and the Tribunal considered that the Government would have been seeking to achieve a fine balance between justifiable deferrals and exemptions on the one hand and, on the other hand, attempts to avoid national service by those who might be viewed as 'draft dodgers'.

104. In those contexts, the Tribunal considered that there was a clear parliamentary intention apparent from the terms of section 35B(5A) that discharge was to be strictly limited, to be decided at very senior levels, and to be agreed only after careful consideration of the legislative criteria.

105. Accordingly, the Tribunal concluded on balance that, in the particular circumstances under consideration in this matter, the clear jurisdictional errors that were made did result in invalidity of the purported discharge decision.

106. As a result, the Tribunal concluded that at 15 February 1973, the purported discharge of Mr Rickerby was unlawful and a nullity, and that he therefore remained a serving member of the Regular Army Supplement. The Tribunal noted that the Defence view was the same - that is, if (contrary to its contention) the discharge was invalid, Mr Rickerby *did remain enlisted*.

**Did the *National Service Termination Act 1973* validate Mr Rickerby's purported discharge?**

107. The *National Service Termination Act 1973* received Royal Assent and came into effect on 21 June 1973. Its substantive provision provided as follows:

> *4. (1) Notwithstanding anything contained in the National Service Act, no person is liable, or shall be deemed to have been liable from and including 5th December, 1972, to register under the National Service Act, to render service under that Act (whether in the Regular Army Supplement, the Regular Army Reserve, the Regular Army Emergency Reserve or the Active Citizen Military Forces) or otherwise to comply with any requirement of that Act or of regulations under that Act.*
>
> *(2) Notwithstanding sub-section (1) of this section, where any person who, before 5th December, 1972, was, by virtue of sub-section 27 (1)of the National Service Act, deemed to have been engaged to serve in the Regular Army Supplement, any service by him on or after that date in the Regular Army Supplement shall be deemed to have been served under that engagement unless it is served under an engagement entered into on or after that date.*[12]

108. In the report of a 2009 inquiry into *Eligibility Criteria for the Award of the*

[12] *National Service Termination Act 1973*, Section 4

*Australian Defence Medal*, the former Defence Honours and Awards Tribunal stated as follows:

> *71. On 5 December 1972 the newly elected Labor Government announced that National Servicemen could choose to leave if they wished. It is apparent from the material before the Tribunal that there then followed a period of some uncertainty and disorganisation in the management of National Servicemen. Some members continued to report for duty while others were sent away or did not report for duty.*
>
> *72. The Tribunal was provided with a copy of the form that was eventually presented to National Servicemen in order to regularise their position. This gave the Serviceman three choices: to serve the uncompleted portion of his National Service obligation; to change category to the Reserve; or to apply for two years leave without pay on grounds of exceptional hardship and seek the earliest possible discharge.*
>
> *73. The National Service Act 1951 had not been amended at this time to relieve members of their National Service obligation. The third option was an administrative device intended to achieve the Government's policy objective by taking advantage of a power in section 35B(5A) of the National Service Act 1951. The whole procedure for the early discharge of National Servicemen was validated by the National Service Termination Act 1973 which came into force on 21 June 1973.*[13]

109. That Tribunal's report does not provide any analysis in support of its assertion that the *National Service Termination Act 1973* 'validated' the discharge decisions purported to have been made under section 35B(5A). From the archive files of that inquiry, it was apparent that this assertion was not made in the Defence submission to the inquiry.

110. The Defence view on this issue in its supplementary written submission to the Tribunal was that:

> *The effect of s 4(1) of the National Service Termination Act 1973 (**NST Act**) was to relieve any person of an obligation to render service under the NS Act, or to comply with any other requirement under that Act. The section does not make any reference to discharging a person from service. As such, the subsection should not be read as validating previous discharges under s 35B(5A).*

111. The Tribunal reached the same conclusion. The language of section 4(1) makes no reference to validity, whether expressly or by inference. Rather, it is confined to liability to register and liability to render service under the National Service Act.

112. Accordingly, given that the Tribunal had concluded that Mr Rickerby remained enlisted because the purported discharge was invalid, the question for the Tribunal became whether Mr Rickerby completed his initial enlistment period so as to become eligible for the Australian Defence Medal.

**Mr Rickerby's 'initial enlistment period'**

[13] Report, Defence Honours and Awards Tribunal, *Inquiry into eligibility for the Australian Defence Medal*, (Inquiry No. 001), Canberra, 11 February 2009.

113. In its written response to the Tribunal's questions, Defence said:

> *If a decision under s 35B(5A) was taken to be of no legal effect due to a failure to comply with a statutory condition, it would have introduced significant uncertainty as to whether a (former) National Serviceman remained liable for service and subject to the obligations of a soldier that followed, including the application of military law. It would give rise to the scenario where a decision that purported to discharge a serviceman, could later be found to be invalid or a nullity, such that the serviceman (unbeknownst to them) remained, and had always remained, subject to those obligations. This would have been an entirely unsatisfactory situation, and not one that the Parliament would have intended.*

114. The Tribunal agreed that if a discharge decision was of no legal effect, the serviceman concerned would have remained subject to military law and that may have been unbeknownst to them. But the Tribunal did not agree that this would have been a matter of any practical concern, or that any such concern would have the effect of rendering effective an otherwise invalid decision. This is because the serviceman was on leave without pay and thus not likely to be called upon to meet any military duty during that leave, and because any liability to be recalled to duty would have persisted only for the balance of their enlistment period. Having regard to the effect of section 34 of the National Service Act referred to above, that period would have expired at the latest two years after the end of the period for which they were enlisted.

115. However, the question of how long a purportedly but invalidly discharged national serviceman remained liable to be recalled to duty could be of potential relevance in the context of the Australian Defence Medal Regulations where eligibility arises on completion of an 'initial enlistment period'.

116. While that term is used in the Australian Defence Medal Regulations, it is not defined in those Regulations. Moreover, it is not a term used in the National Service Act. As a result, there is no readily ascertainable definition of it.

117. The Tribunal considered that there were three possibilities in identifying when Mr Rickerby's initial enlistment period might have ended:

- 18 months after the date on which he was first enlisted - that date clearly was his initial enlistment period, at least up until any statutory alteration by force of section 34. The later period of Reserve service to which he was liable upon conscription was a separate period that was only deemed to commence after the end of the initial enlistment period and thus should be ignored in considering when his 'initial' enlistment period expired;

- at the expiry of 18 months plus any leave without pay actually taken by Mr Rickerby, which was 12 days; or

- at the expiry of 18 months plus the two years' leave without pay that was approved but not taken.

118. The latter two possibilities would arise only if section 34 was considered to have an impact for the purposes of the Australian Defence Medal Regulations.

119. While the Tribunal was minded to think that the first possibility was the correct meaning of the term 'initial enlistment period' used in the Australian Defence Medal

Regulations and that section 34 of the National Service Act could not be determinative of a term used exclusively in the Australian Defence Medal Regulations, it concluded that it was nevertheless unnecessary in the facts of this particular case to actually settle upon an end-date for Mr Rickerby's initial enlistment period because, whatever the correct period, it had clearly expired by the time he first applied for the Australian Defence Medal.

**Did Mr Rickerby 'complete' that initial enlistment period?**

120. Whatever the length of his initial enlistment period, it is clear that Mr Rickerby would only be eligible for the Australian Defence Medal by 'completing' that period. The Australian Defence Medal Regulations contain no relevant definition of the word 'completing'.

121. The Defence position was that if Mr Rickerby was not validly discharged, he remained enlisted but did not complete his initial enlistment period. The reasons Defence gave for this argument appeared to the Tribunal to be, in essence, because he was not on duty beyond 3 January 1973 when he proceeded on leave without pay.

122. The Tribunal considered that it was clear from the Australian Defence Medal Regulations that eligibility required not only 'qualifying service' but also qualifying service that was 'eligible service'. In the absence of any contrary provision in the Regulations, the Tribunal considered that 'qualifying service' meant service while enlisted. Mr Rickerby was specifically approved for leave without pay on condition that he *acknowledge, that my period of national service obligation has not expired and that I am still subject to military law.* Accordingly, the Tribunal concluded that every day that he remained enlisted was a day of 'qualifying service' notwithstanding that he was on leave without pay.

123. But was his period of leave without pay 'efficient service'?

124. The distinction between 'qualifying service' and 'efficient service' was highlighted by Australian Defence Medal Regulation 4(2), which provided that ... *the Chief of the Defence Force or his or her delegate may determine that a period of the member's qualifying service is efficient service*.

125. That distinction was made even more evident when the Regulations were amended on 13 July 2020 to provide that the Chief of the Defence Force may determine:

*(a) that a period of the member's qualifying service is efficient service;*
*(b) the minimum annual period of service to be completed by a member for each year of qualifying service*.

126. The 4 September 2007 determination applicable at the time that Mr Rickerby's application for the Australian Defence Medal was refused simply provided that 'not less than a minimum period of 18 months full-time national service, or five years part-time national service, commencing on or after 4 June 1971, was determined to be *efficient service for the award of a medal to members or former members of the Defence Force who qualify for the award of the medal under section 4 of the regulations*. That is, the determination provided that all qualifying service was efficient service.

127. While it would have been open to the Chief of the Defence Force to determine that

certain periods of qualifying service rendered while enlisted (such as while on leave without pay) were not efficient service, the power to do so was not exercised.

128. Accordingly, the Tribunal concluded that all of Mr Rickerby's time while enlisted counted towards completion and, given that on any calculation his initial enlistment period had expired, he had given qualifying service that was efficient service throughout his initial enlistment period and thereby completed that period as required by the Australian Defence Medal Regulations.

129. For completeness, the Tribunal noted that it also considered whether or not section 4 of the *National Service Termination Act 1973* could be construed as causing the initial enlistment period of a national serviceman to be 'completed' (which would have the effect of bringing about eligibility for the Australian Defence Medal even though the original period of their enlistment had not expired).

130. Where a national serviceman served for the full period their enlistment, they were thereby no longer liable to render service under the National Service Act. That same 'end-state' was declared to exist from 5 December 1972 by section 4(1) of the *National Service Termination Act 1973*. Did this mean that section 4(1) had the effect of deeming their period of enlistment to be completed?

131. In this regard, the Tribunal noted that, in its submission to the 2009 inquiry by the former Tribunal, Defence had provided a copy of legal advice it had received from DLA Phillips Fox. That advice included the following:

> *In our view, the reference to "initial enlistment period' in paragraph 4(1)(a) of the ADM Regulations should be read in light of the National Service Termination Act 1973 which removed servicemen's obligation to continue with their National Service.*
>
> *As such, for servicemen who elected to discontinue their period of service at that time, their initial enlistment period will be the date of enlistment (which we have taken to be the date on which they make the oath) to 4 December 1972.*
>
> *The 'initial enlistment period' for National Servicemen must, in our view, be considered in light of the National Service Termination Act 1973. Section 4 of that Act removed the obligation imposed on 20 year old males, ordinarily resident in Australia, to register and, if balloted, to render service, under the National Service Act 1951. The Termination Act effectively gave enlisted servicemen the option to discontinue their service in the army. Section 4 also preserved the operation of the National Service Act in respect of those servicemen who elected to continue to serve after 5 December 1972 and completed their period of engagement.*
>
> *In our view, it is open to read 'initial enlistment period' as being the period between taking the oath/declaration and the 4 December 1972 (i.e. the last day on which the National Service Act imposed an obligation to register / render service). Once the obligation to render service was removed and servicemen elected to discontinue their National Service, we do not think it is correct to regard those men as continuing to be enlisted.*
>
> *...*
>
> *We therefore conclude that it is reasonably open to interpret 'initial enlistment period' in regulation 4 of the ADM Regulations as being affected (and shortened) by the*

*National Service Termination Act*.[14]

132. Thus, on that view, Mr Rickerby would have met the eligibility criteria for the Australian Defence Medal on 4 December 1972 when his statutorily-shortened period of enlistment was 'completed'.

133. However, with respect to DLA Phillips Fox, the Tribunal concluded that the *National Service Termination Act 1973* did not have the effect of 'completing' any enlistment period. This is because section 4(2) provided that any service actually rendered beyond 5 December 1972 was deemed to have been rendered as part of that period, so clearly the original enlistment period continued, albeit on the basis that further service was voluntary and not compulsory. The Defence submission came to the same conclusion. [The Tribunal noted that, in that written submission, Defence did not address the DLA Phillips Fox advice.]

**Conclusion about Mr Rickerby's Australian Defence Medal eligibility**

134. In light of the above analysis, the Tribunal concluded that Mr Rickerby met the eligibility criteria for award of the Australian Defence Medal because his purported discharge was a legal nullity and not subsequently validated, with the effect that his initial period of enlistment expired by the effluxion of time notwithstanding that his service was not on duty while he was on leave without pay.

135. The Tribunal thus turned to consider whether or not there was any reason why it should not recommend that he be awarded the Australian Defence Medal.

136. In this regard, it considered whether such a recommendation should not be made on any of three grounds:

- because the purported discharge was a matter of administrative expedience or necessity;
- because award would be contrary to good policy; or
- because refusal would be a proper exercise of the executive prerogative.

**Administrative Expedience or Necessity**

137. The Australian Labor Party campaigned for the 1972 federal election on a platform that included withdrawal of all Australian troops from South East Asia and, in particular, Vietnam.

138. After a clear victory when polling closed on 2 December 1972, a 'ground-breaking' two-person Cabinet of Prime Minister Whitlam and Deputy Prime Minister Barnard was sworn in by the Governor-General on 5 December 1972. In the two weeks of this 'duumvirate' before a full Cabinet was sworn in on 19 December 1972, many significant decisions were made and announced or implemented. These included a direction, announced on 5 December 1972, that all Australian combat troops were to be withdrawn from Vietnam within three weeks.

139. But this was not the underlying cause of the circumstance in which the Army found itself having many thousands of surplus troops because of conscription. The previous Government had commenced a gradual process of withdrawal in 1970, when then Prime Minister Gorton announced on 22 April 1970 that the 8th Battalion Royal Australian

[14] Submission 34, *Inquiry into eligibility for the Australian Defence Medal*

Regiment would not be replaced when its tour ended in November 1970, and on 18 August 1971, when then Prime Minister McMahon announced that the remainder of the Task Force would be withdrawn at the end of the year.

140. Notwithstanding these announcements, the Department of Labour and National Service continued to hold national service ballots on 28 September 1970, 26 March 1971, 17 September 1971, 24 March 1972 and 22 September 1972.

141. Clearly, the Army had considerable time to plan for an orderly downsizing and it cannot be said that using the artifice of section 35B(5A) was an expedient made necessary by unexpected and immediate decisions of government.

142. Moreover, the Army either knew or ought reasonably to have known that use of section 35B(5A) as a downsizing mechanism was not legally valid, if for no other reason that it required a considered finding of exceptional hardship on the part of the individual serviceman or their family.

143. There were at least two other downsizing options that were readily available. Those wishing to leave could have been simply been granted leave without pay and either:

- their enlistment allowed to expire by the effluxion of time; or
- the Government requested to legislate an unequivocal power of discharge to be exercised within the period of leave without pay.

144. Of course, it may well have been thought at the time that a knowing use of an invalid mechanism was an acceptable risk as there would be no consequence – those 'discharged' had positively chosen to leave and had provided an indemnity to the Commonwealth. But, even if that is correct, this was clearly not a case of 'necessity being the mother of invention.'

**Policy considerations**

145. Although it may have been unanticipated, the potential for consequence arose on 20 March 2006 when the Australian Defence Medal was created by Letters Patent with Regulations that rendered eligible those who had *given qualifying service that is efficient service* and completed *an initial enlistment period*.

146. The distinction between 'qualifying service' and 'efficient service' was highlighted by Regulation 4(2), which provided that *... the Chief of the Defence Force or his or her delegate may determine that a period of the member's qualifying service is efficient service*.

147. As noted above, that distinction was made even more evident when the Regulations were amended on 13 July 2020 to provide that the Chief of the Defence Force may determine:

*(a) that a period of the member's qualifying service is efficient service;*
*(b) the minimum annual period of service to be completed by a member for each year of qualifying service*.

148. Notwithstanding these clear powers, no Chief of the Defence Force determination has ever declared any period of qualifying service to be not efficient service.

149. The 4 September 2007 determination applicable at the time that Mr Rickerby's

application for the Australian Defence Medal was refused simply provided that 'not less than a minimum period of 18 months full-time national service, or five years part-time national service, commencing on or after 4 June 1971, was to be *efficient service for the award of a medal to members or former members of the Defence Force who qualify for the award of the medal under section 4 of the regulations*. That is, the determination provided that all qualifying service was efficient service.

150. In the context of the Defence Long Service Medal, which has a similar criterion of qualifying service that is efficient service, the Tribunal has drawn attention to this vacuum on a number of occasions - see *Hogan and the Department of Defence* [2020] DHAAT 12 at paragraphs 7 to 10, *Clarke and the Department of Defence* [2022] DHAAT 06 at paragraphs 46 to 49 and *Jackson and the Department of Defence* [2021] DHAAT 14 at paragraphs 27 to 30.

151. As a result, as matters stood at the time of the refusal to recommend Mr Rickerby for the Australian Defence Medal and as they still stand, all service counts towards Australian Defence Medal eligibility notwithstanding that it is not service on duty – for example, while absent without leave, while subject to disciplinary punishment or, most relevantly, while on leave without pay.

152. Had the available power been exercised, then Mr Rickerby's service while on leave without pay might have been excluded from the calculation of whether or not he had 'completed' his initial enlistment period. [The Tribunal noted that the 6 February 2007 legal advice provided by DLA Phillips Fox, referred to below, raised this same potential resolution.]

153. Whether that power should now be exercised by the Chief of the Defence Force so as to render ineligible others in the same circumstances as Mr Rickerby who might make future applications for the Australian Defence Medal is a matter for consideration by the Chief of the Defence Force, and not by the Tribunal.

154. That consideration would involve issues of policy.

155. Some may well argue that an Australian Defence Medal should not be awarded in recognition of 'inactive' service such as while absent without leave, while subject to disciplinary punishment, or while on leave without pay.

156. Others may argue that those national servicemen who took early 'discharge' when offered actually benefited the Australian Defence Force and the public by removing the need for them to be paid and maintained for an extended period and, having done all that was required of them after they were compulsorily conscripted, should have that service recognised by the Australian Defence Medal and not just by the Anniversary of National Service Medal.

157. The former was clearly the policy view of the former Defence Honours and Awards Tribunal, which conducted an inquiry into *Eligibility Criteria for the Award of the Australian Defence Medal* in 2009. In its report, it stated:

> *78. Some of the five appeal cases of former National Servicemen considered by the Tribunal included extensive submissions. The Tribunal also received a number of very detailed submissions from organisations and individuals. Many of the submissions argued that members whose National Service obligation was terminated by the Government in 1972 had fulfilled their service obligation and should be*

*eligible for the ADM. It is claimed that they had no real choice in the matter and that their discharge on exceptional hardship grounds was not with their consent but was the ADFYs selection of a ground for discharge. It is claimed that the reality of the situation was that their services were no longer needed by the ADF and that the discharge on exceptional hardship grounds was merely a device to remove them from the ADF.*

*79. The Tribunal is not persuaded that there should be any change made to the requirement that National Servicemen should have completed 18 months service to be eligible for the award of the ADM.*

*80. The Tribunal considers that a number of factors point against changing the time specified in CDF's Determination:*

a. *The intent of the award of the ADM is to recognise commitment and service. The length of time that a person has served is relevant to this;*

b. *In taking an option for a free discharge, albeit on somewhat contrived grounds, National Servicemen were making a personal preference. It would have been possible for them to continue in the ADF until they had completed their enlistment period and a significant proportion of them did so;*

c. *The term ',exceptional hardship' was an expedient to permit quick discharge from National Service, not a compassionate or personal circumstance condition;*

d. *National Servicemen already have their service recognised with the award of the ANSM; and*

e. *While there was support for the extension of the persons qualified to receive the award from some former National Servicemen, there was strong opposition to this occurring from many other serving and former members of the ADF.*

*81. In the Tribunal's view, having regard to the basis for the award of the ADM, the integrity of the honours and awards system would not be served by extending eligibility for the ADM to National Servicemen who did not complete at least 18 months service.*

*Tribunal Recommendation*

*82. The Tribunal recommends that the Regulations and the Determination made under the Regulations not be changed to include members who fall within category (d).*[15]

158. In the present matter, the Tribunal was conducting a merits review of a decision by reference to the prevailing eligibility criteria, rather than an inquiry into what might be the best policy. Accordingly, the Tribunal as constituted for this review chose not to express any preferred policy view on whether or not the present eligibility criteria should be changed. Rather, it confined itself to considering the application of the current law.

[15] Report, Defence Honours and Awards Tribunal, *Inquiry into eligibility for the Australian Defence Medal*, (Inquiry No. 001), Canberra, dated 11 February 2009

**Executive Prerogative**

159. Section 61 of the Australian Constitution vests the executive power of the Commonwealth in the Monarch and provides that such power is exercisable by their representative in Australia, the Governor-General. The grant of honours, once regarded as part of the prerogative of the Crown, is now encompassed in the executive power conferred by section 61.

160. Letters Patent and their accompanying Regulations do not confer a right or entitlement on a person who meets the eligibility criteria set out therein to have conferred a defence honour or award. The Australian Defence Medal Regulations provide that the Australian Defence Medal 'may' be awarded to a person who meets the eligibility criteria, and not that it 'must' be awarded to such a person.

161. Rather, such honours and awards are conferred in exercise of the prerogative power of the Commonwealth and there may be sound countervailing reasons why, in exercise of that prerogative, an honour or award should not be conferred on a person who otherwise meets the eligibility criteria.

162. The Tribunal thus considered whether there was any countervailing reason why the Australian Defence Medal should not be awarded to Mr Rickerby in exercise of that prerogative, despite him meeting the eligibility criteria.

163. There was nothing in any of the material before the Tribunal that suggested that Mr Rickerby is not, in any way, a fit and proper person to be awarded a defence honour or award.

164. The only potential basis on which the prerogative might be exercised against awarding the Australian Defence Medal to Mr Rickerby thus appeared to be that about half of his qualifying service was not service on duty because he was on leave without pay. However, relevant to that potential basis are the following points:

- Mr Rickerby was effectively invited by the Army to take leave without pay for the convenience and benefit of the Army;

- the fact that his service while on leave without pay was qualifying service was because the Army purported to exercise a power of discharge that it knew or should reasonably have known was not available for that purpose; and

- the fact that his service while on leave without pay was efficient service was because the CDF had not exercised the power under the Australian Defence Medal Regulations to declare that certain periods of qualifying service were not efficient service.

165. In these circumstances, the Tribunal concluded that it would not be appropriate to exercise its power under section 110VB(3) of the Defence Act to recommend that the Governor-General should exercise the power prerogative to refuse to award the Australian Defence Medal to Mr Rickerby.

166. In the view of the Tribunal, this position was not inconsistent with the policy reflected in Regulation 4(1)(d) that eligibility for the Australian Defence Medal should not be lost where early discharge is due to no fault of the member or is brought about by adverse

circumstances within the control of Defence.

**Tribunal decision**

167. In light of all the above, the Tribunal decided to set aside the Defence decisions of 15 February 2008 and 20 January 2020 refusing to recommend Mr Rickerby for the Australian Defence Medal and, in their stead, to substitute a new decision to recommend Mr Rickerby for the Australian Defence Medal.