Barnett and the Department of Defence re: Sheean [2019] DHAAT 09 (23 July 2019)

Key points

- The 2019 review of the Defence Honours and Awards Appeals Tribunal into the case of Ordinary Seaman Edward Sheean contradicts an earlier comprehensive inquiry conducted by the same Tribunal into the same matter from 2011 to 2013. It does so in the absence of new evidence.
- The 2019 review also contradicts clear and well-established Government policy on the award of historic VCs.
- The Government is not required to respond to the Tribunal. However, given the Applicant will be provided with a copy of the 2019 review, a response is likely to be necessary.
- Any Government response to the Tribunal's findings should be settled with the Prime Minister.
- We would recommend that the Government reject the findings of the Tribunal by correspondence from the Minister for Veterans and Defence Personnel to the Tribunal.

Background

The Defence Honours and Awards Appeals Tribunal

The Tribunal is established under the *Defence Act 1903* (the Act), to provide applicants with a right of appeal in relation to Defence honours and awards.

The Minister's second reading speech, presented during parliamentary debate of the legislative amendments which established the Tribunal, indicates the intention that the Tribunal would be the final arbiter in Defence honours and awards matters within its jurisdiction, subject to usual administrative and judicial review laws:

> "The tribunal's recommendations back to the decision maker will be the final step in the review process. However, a person will be able to apply for review of tribunal decisions under the *Administrative Decisions (Judicial Review) Act 1977*, and under section 39B of the *Judiciary Act 1903*."

Under the Act, the Tribunal can review Defence decisions to refuse to recommend a person for a Defence honour or award, in response to an application. However, the Act does provide for the Chair of the Tribunal to dismiss an application for review in circumstances where the matter has already been adequately reviewed.

The case of Ordinary Seaman Edward Sheean in 1942

Sheean was the subject of a contemporary nomination process which resulted in the posthumous award of the *Mention in Despatches* (MID) for his actions in 1942.

This case is one of thirteen cases involving deceased servicemen considered by the Tribunal in its 2011-13 *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry).

The Valour Inquiry reviewed this original decision and "concluded that Sheean's actions displayed conspicuous gallantry but did not reach the particularly high standard required for recommendation for a VC." It recommended that "no action be taken to award Ordinary Seaman Sheean a VC or other further form of recognition for his gallantry or valour".

The Valour Inquiry also carried out a review of the merits of the case and "concluded that there was not sufficient evidence to find that there was a manifest injustice with regard to the outcome of the recommendation concerning Sheean. The Tribunal was also satisfied that there was no new evidence to support the reconsideration of Sheean for a VC for Australia."

The Government accepted the recommendations of the Valour Inquiry in 2013.

The 2019 Review

Despite the Tribunal having already reviewed this case as part of its Valour Inquiry, the Chair of the Tribunal chose to proceed with another review of the Sheean case, on application by Mr Barnett, seeking review of a decision by Chief of Navy in 2018 to refuse to recommend the award of a VC.

In our view, the fact that the Tribunal has effectively reviewed its previous review does not align with the intended purpose of the Tribunal as the final arbiter in Defence honours and awards matters.

The 2019 review "is not concerned with the process adopted in 1942 in submitting Sheean for medallic recognition". Rather, it has carried out a full merits review of the incident. It has not reviewed the process of the original decision to award the MID. By comparison, the Valour Inquiry conducted both a process review and a merits review of the Sheean case in 2011-13. On that basis, the Valour Inquiry was a more comprehensive review of the case.

The Act provides that when reviewing a reviewable decision, the Tribunal is bound by the '*eligibility criteria'* that governed the making of the original decision. The 2019 review applies a strict approach to the eligibility criteria as articulated in the VC Regulations. In practice, the eligibility criteria applied to the VC include the Regulations, and the other rules and procedures applicable in the circumstances.

It is not apparent that the 2019 review had any new evidence available to it which had not already been considered by the Valour Inquiry.

The evidentiary standards for recommending the award of the *Victoria Cross* were and are the highest of standards. Recommendations rely on a nomination raised by the commanding officer in the field supported by contemporary eyewitness accounts. Three independent witness statements are considered the minimum necessary to support a recommendation.

The 2019 review acknowledges that "Government policy is a relevant consideration in a merits review by a tribunal, and it is usually applied in the absence of cogent reasons not to follow such policy."

Defence, as Respondent in the 2019 review, maintained that, as a matter of policy, no retrospective honours and awards would be considered unless it could be demonstrated that there had been maladministration, or compelling new evidence presented that was not available to the decision-makers at the time.

The 2019 review expresses a view that "[Defence] policy … is at odds with the eligibility criteria for the VC, and indeed, all of the Gallantry Regulations …" but does not further explain this concern. Importantly, the Tribunal does not identify any strong reasons for diverging from clear Government policy in this case.

The policy in relation to historical award of the VC

The Department of the Prime Minister and Cabinet advised the then Chair of the Tribunal in 2012 that "successive governments' policy to date has been to only make recommendations to The Queen for recognition of past acts in cases in which a finding was made that the lack of recognition was manifestly unjust".

The (March 1994) *Report of the Committee of Inquiry into Defence and Defence Related Awards* states (page 11):

> "In 1952, the Queen agreed that there could be no further review of awards for actions during and arising out of World War II. This decision was taken to ensure that arrangements previously put in place by the British Government and other governments of the British Commonwealth would not be altered. The feeling was that any variation or new award could only have given rise to new anomalies and throw out of balance the decisions made at that time by those involved in the campaigns of World War II and its aftermath. The Queen's position on this matter was reaffirmed in 1965."

Recommendations of the 2019 Review

When reviewing an honour, as opposed to an award, the Tribunal has no decision-making power and can only make recommendations to the Government.

The 2019 review makes two recommendations, that:

1. The decision by the Chief of Navy to refuse to recommend the award of the Victoria Cross for Australia to … Sheean … be set aside.
2. The Minister recommend … that … Sheean be posthumously awarded the Victoria Cross for Australia … [for his actions] … on 1 December 1942.

In our view, both these recommendations are flawed.

In relation to Recommendation 1, we note that a recommendation for the award of the *Victoria Cross for Australia* can only be made by the Minister. The Chief of Navy cannot recommend the award of the Victoria Cross for Australia. *Ipso facto*, the Chief of Navy cannot refuse to recommend the award of the Victoria Cross for Australia. On that basis, there is arguably no valid decision by the Chief of Navy to be set aside.

In relation to Recommendation 2, Sheean was posthumously awarded the *Mention in Despatches* for his actions on 1 December 1942. Only one award or honour should be awarded in recognition of a particular act. In any event, the findings of the 2011 Valour Inquiry, being a more comprehensive review of the matter, and consistent with Government policy in this regard, are to be preferred.

We understand that the Tribunal has provided the report of the 2019 review to the Minister for Veterans and Defence Personnel because that minister is responsible for the Tribunal within the Defence portfolio. However, as this review concerns the *Victoria Cross for Australia* any consideration of recommendation for that award requires the involvement of the Minister for Defence and the Prime Minister. On that basis, the Government response to the 2019 review should be settled with the Minister for Defence and the Prime Minister.

Options for Government

The Government could either accept; not respond to; or reject the Tribunal's recommendations.

Option 1: Accept

If the Government accepts the recommendations of the Tribunal, the Minister for Defence (in consultation with the Prime Minister) will need to write to The Queen to recommend the award of the *Victoria Cross for Australia* to Ordinary Seaman Sheean. The decision rests with The Queen.

This is not recommended for the reasons set out below. It would also generate significant pressure on the Government to reconsider large numbers of similar historic cases.

Option 2: Not Respond

There is no formal requirement for the Government to respond to or implement the recommendations of the Tribunal. However, the Act requires the Tribunal to provide the report of the review to the applicant which will likely generate expectations of a response. The outcomes of the 2019 review, when widely known, will certainly provoke renewed advocacy for reviews of other historic cases.

Option 3: Reject

The Government could reject the recommendations of the 2019 review on the basis that:

1. The matter was adequately reviewed by the Defence Honours and Awards Appeals Tribunal in its 2011-13 *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry), which recommended that "no action be taken to award Ordinary Seaman Sheean a VC or other further form of recognition for his gallantry or valour". The Government accepted the recommendations of the Valour Inquiry in 2013.
2. The 2019 review does not present any compelling new evidence that might support reconsideration of the decision, made by the competent authorities at the time, to recognise the gallant actions of Ordinary Seaman Sheean on the HMAS Armidale on 1 December 1942 with the award of a *Mention in Despatches* (MID).
3. Implementation of the 2019 review's recommendations would inevitably result in requests for further reviews of the Tribunal's previous inquiries and reviews, and such an outcome would not be in keeping with the aim of Tribunal being the final arbiter of Defence honours and awards matters.

4. Clear Government policy, informed by Her Majesty's expressed views, would only allow the award of a VC in this case in the light of new compelling evidence, or in a case of manifest injustice. Neither of these conditions exist here.

Having settled the Government response with the Minister for Defence and the Prime Minister, the Minister for Veterans and Defence Personnel could write to the Chair of the Tribunal advising the Government response and requesting that the Tribunal advise the parties of the outcome.

s22 [redacted]

20 Sept 2019

The Hon Darren Chester MP
Minister for Veterans and Defence Personnel

MB19-001099

The Hon Scott Morrison MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

On 23 July 2019, the Defence Honours and Awards Appeals Tribunal (the Tribunal) submitted its report and findings to me in the review of Barnett and the Department of Defence regarding Ordinary Seaman Edward Sheean to be awarded the Victoria Cross.

The Tribunal recommended that I set aside the decision by the Chief of Navy not to award the Victoria Cross and that I recommend to the Sovereign that Ordinary Seaman Sheean be posthumously awarded the Victoria Cross for Australia. I agree with the Tribunal's recommendations and therefore seek your support to recommend the award to the Sovereign.

A Victoria Cross is awarded *for the most conspicuous gallantary, or a daring, or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy*. The Tribunal found that Ordinary Seaman Sheean's decisions and acts demonstrated a special and additional element of courage, beyond what was expected of him.

Background
On 01 December 1942, HMAS Armidale came under attack from a number of Japanese bombers and fighters. The ship was struck by two torpedoes and possibly one bomb and sunk quickly. During the action, one bomber and one fighter crashed, the bomber was brought down by the aft Oerlikon manned by Ordinary Seaman Sheean, who remained at the gun until the ship sunk. Ordinary Seaman Sheean was awarded the Posthumous Mention in Dispatches for his gallantry.

For a number of years Ordinary Seaman Sheean's family and others, including the Hon Guy Barnett have advocated for a Victoria Cross to be awarded for his actions during the sinking of HMAS Armidale. In 2013, Mr Barnett sought that Ordinary Seaman Sheean's case be included in the Valour Inquiry (Inquiry into the Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour). The Valour Inquiry recommended that no action be taken to award Sheean a Victoria Cross or any other form of recognition. Mr Barnett subsequently approached the Chief of Navy in August 2017 who informed that Ordinary Seaman Sheean's recognition had already been considered and that as there was no new evidence, recognition would not be reconsidered. Mr Barnett applied to the Tribunal seeking a review of the Chief of Navy's decision in October 2018 which was accepted.

Parliament House
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Summary of Tribunal Report

At the Tribunal hearing, evidence was provided by a number of individuals including the Chief of Navy, Admiral Michael Noonan and Commander Paul Fothergill who undertook research for the Defence report. Evidence was supplied by reports of the day, historians as well as written testimonies from members who served alongside Ordinary Seaman Sheean on HMAS Armidale (only one surviving member).

On that fateful day while under attack, an order was given to abandon ship. Evidence suggests that Ordinary Seaman Sheean made his way to abandon, however instead returned to the Oerlikon where his position was actually a loader not a gunner, strapped himself in and began firing, shooting down one and possibly damaging another aircraft. Ordinary Seaman Sheean was likely already wounded when he strapped himself into the gun and soon after, he went down with the ship.

There is documented evidence from the Commanding Officer and a shipmate that Ordinary Seaman Sheean was responsible for bringing down an enemy bomber. Weight was placed on a shipmate's evidence which was published in 1945 and confirmed by the only surviving shipmate which is consistent with recorded evidence. The Tribunal concluded that the Report of Proceedings completed by the Commanding Officer, understated Ordinary Seaman Sheean actions that day.

Defence's Position

The Chief of the Defence Force has directed Defence, and has maintained the view, that no retrospective honours and awards are considered unless there has been maladministration or there is compelling new evidence not available at the time. This is to maintain the integrity of the Australian honours and awards system. The Valour Inquiry relied on this direction which resulted in its finding that no honours are to be awarded. Defence also note that the decision to award was based on the evidence and assessment of the day and we should respect original decisions where process has been followed.

Considerations

Reservations have been expressed regarding the potential precedent this award may set for other retrospective requests, however I do not anticipate this and trust that the Tribunal will appropriately manage any influx and only review what is necessary under its guidelines. It is important to note that the Tribunal has received many inquiries for awarding a Victoria Cross, but this is the first recommendation since its establishment as a statutory body in 2011 that the Tribunal is supportive following its review. Whatever the decision, it is anticipated that there will be significant media commentary.

The Tribunal's report is enclosed should you require further information on this review. Should you support my recommendation, our office will engage with British High Commission to facilitate the request to the Sovereign to award the Victoria Cross. A copy of this letter has been provided to the Minister for Defence, the Hon Linda Reynolds.

Yours sincerely

s22 [redacted]

DARREN CHESTER 30 SEP 2019

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Australian Government

Defence Honours and Awards Appeals Tribunal

Barnett and the Department of Defence re: Sheean [2019] DHAAT 09 (23 July 2019)

File number	2018/43
Re	**The Hon Guy Barnett, MP** Applicant
And	**Department of Defence** Respondent
Tribunal	Mr M Sullivan, AO (Presiding Member) Mr D Ashley, AM Brigadier M Bornholt, AM (Retd) Ms N Isenberg
Hearing Dates	**25 and 26 March 2019**

DECISION

On 23 July 2019 the Tribunal decided to recommend to the Minister for Defence Personnel that:

a) The decision by the Chief of Navy to refuse to recommend the award of the Victoria Cross for Australia to Ordinary Seaman Edward Sheean in respect of his actions in HMAS *Armidale* during a Japanese aerial attack in the Timor Sea on 1 December 1942 be **set aside.**

b) The Minister **recommend** to the Sovereign that Ordinary Seaman Edward Sheean be posthumously awarded the Victoria Cross for Australia for the most conspicuous gallantry and a pre-eminent act of valour in the presence of the enemy in HMAS *Armidale* during a Japanese aerial attack in the Timor Sea on 1 December 1942.

De-classified

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CATCHWORDS

DEFENCE HONOUR – posthumous Mention in Despatches – application for Victoria Cross for Australia - merits review - whether the service should be recognised with a higher honour — eligibility criteria – decision-making – reliance on policy – policy inconsistent with eligibility criteria.

LEGISLATION

Defence Act 1903 - ss 110V(1), 110VB(1)
Defence Act 1903 – ss 110T, 110V(1), 110VA, 110VB(1)
Defence Regulation 2016 – Clause 35
Commonwealth of Australia Gazette No.S25 dated 4 February 1991, *Victoria Cross Regulations*
Commonwealth of Australia Gazette No.S25 dated 4 February 1991, *Gallantry Decorations Regulations*

De-classified

De-classified

REASONS FOR DECISION

Background

1. On 1 December 1942, during operations in the Timor Sea, the *Bathurst* Class Corvette HMAS *Armidale* came under aerial bombardment and torpedo attack from a number of Japanese bombers and fighters. *Armidale* was struck by two torpedoes and possibly one bomb. The ship sank in a short period of time. During the action one bomber and one fighter crashed into the sea some distance from the ship as a result of the ship's anti-aircraft fire. The bomber was brought down by the aft Oerlikon manned by Ordinary Seaman Edward Sheean, who remained at the gun until the ship sank.[1]

2. For many years Sheean's family, and others, including the Honourable Guy Barnett MP, the Tasmanian Minister for Veterans' Affairs, have agitated for an (Imperial) Victoria Cross (Imperial VC) or Victoria Cross for Australia (VC) to be awarded to Sheean for his actions during the sinking of *Armidale*. While Sheean was awarded a posthumous Mention in Despatches (MID), it has been consistently asserted by his many supporters that the MID does not adequately reflect the gallantry associated with his actions.[2]

3. The Applicant, Mr (then, Senator) Barnett originally sought that Sheean be included in the Tribunal's *Inquiry into Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour* (the Valour Inquiry).[3] He and others made written and oral submissions to the Valour Inquiry, with most advocating for a VC for Sheean. However, the Valour Inquiry recommended that 'no action be taken to award Ordinary Seaman Sheean a VC or other further form of recognition for his gallantry or valour'.[4]

4. On 10 August 2017, the Applicant wrote to the then Chief of Navy, Vice Admiral Tim Barrett, AO, CSC, RAN seeking that Sheean's bravery be reconsidered for more appropriate recognition, in particular, that he be posthumously awarded the VC, or 'other such award as appropriate'.[5] At the hearing the Applicant confirmed that his application related to a VC for Australia, but if the Tribunal was unable to make such a recommendation, he asked that Sheean be considered for an alternative gallantry decoration. However, in his closing submission, he stated that any lesser award could risk demeaning Sheean's reputation.

5. On 31 July 2018, the present Chief of Navy, Vice Admiral Michael Noonan, AO, RAN informed Mr Barnett that Sheean's medallic recognition had already been considered during the Valour Inquiry and that the findings and recommendations of that Inquiry had been

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[1] Adapted from Official History Royal Australian Navy 1942-1945, Gill G.H., (1968), *Volume II - Royal Australian Navy 1939-1942,* (1st edition 1968), p 218.

[2] Under the Imperial system, only two posthumous awards could be made for gallant actions in the presence of the enemy: the Victoria Cross and the MID. If it was considered that the action did not warrant a posthumous VC, the only alternative was the award of a MID – this has been termed by some as the 'posthumous gap'. See *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour*, p 82 [8-18]

[3] *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour 2013* (Valour Inquiry).

[4] Valour Inquiry, p. 231 [17-144].

[5] Application by Mr Barnett to Chief of Navy dated 10 August 2017, Folio #293.

De-classified

accepted by Government on 1 March 2013. Admiral Noonan also informed Mr Barnett that, nonetheless, he had considered the matter and formed the view that there was no new evidence that supported reconsideration or review of Sheean's actions.[6]

6. On 30 October 2018, Mr Barnett applied to the Tribunal seeking review of the Chief of Navy's decision of 31 July 2018.[7] He submitted that Sheean's actions were deserving of a full, merits-based review by the Tribunal.

7. In accordance with its *Procedural Rules*, on 8 November 2018, the Tribunal informed the Department of Defence (Defence) of Mr Barnett's Application for Review and sought a Report in relation to the reviewable decision, being Admiral Noonan's decision of 31 July 2018.[8] On 5 February 2019, Admiral Noonan responded on behalf of Defence and provided a copy of the Defence Report,[9] which was forwarded to the Applicant for comment.[10] The Applicant's comments were received by the Tribunal on 13 March 2019 and were provided to Defence.[11] The Applicant sought withdrawal of some remarks in the Defence Report, and, at the hearing, the Respondent consented to this course. Both parties have copies of the evidentiary material that the Tribunal has relied on during this review.

8. Evidence was given at the hearing by Mr Barnett, Admiral Noonan and Commander Paul Fothergill, RAN who had undertaken research for the Defence Report. Evidence was also given at the hearing, at the request of the Applicant, by Dr Tom Lewis OAM, historian and author,[12] Mr David Webb, Vice President, Returned & Services League, Tasmania, and Sheean's nephews, Mr Garry Ivory and Mr Grant Sheean. The Applicant also provided letters of support from the Naval Association of Australia,[13] [14] from Mr Bill Allen of the RAN Corvettes Association,[15] from Mr Garth Porter AM[16] and from the Latrobe Council,[17] the municipality where Sheean was born.

Jurisdiction of the Tribunal

9. As outlined at the hearing, the *Defence Act 1903* (the Act) specifies the Tribunal's two distinct functions; the Inquiry function and the Review function.

[6] Chief of Navy Letter 481 to Mr Barnett dated 31 July 2018.
[7] Application for Review of Decision by Mr Barnett dated 30 October 2018.
[8] DHAAT Letter 626 to Secretary, Department of Defence dated 8 November 2018.
[9] Chief of Navy Letter 030 to DHAAT dated 5 February 2019.
[10] DHAAT Letter 043 to Mr Barnett dated 13 February 2019.
[11] Mr Barnett Letter to DHAAT undated.
[12] Dr Tom Lewis, *Honour Denied: Teddy Sheean, a Tasmanian Hero*, Avonmore books, SA, 2016.
[13] Naval Association of Australia Letter dated 12 March 2019.
[14] Naval Association of Australia Letter dated 19 March 2019.
[15] Royal Australian Navy Corvettes Association undated Letter.
[16] Mr Garth Porter AM undated Letter.
[17] Latrobe Council Letter dated 6 March 2019.

The Tribunal's Inquiry Function

10. Under s 110W of the Act, the Minister may direct the Tribunal to hold an Inquiry into a specified matter concerning honours and awards for eligible service with the Australian Defence Force (ADF). In doing so, the Minister gives the Tribunal Terms of Reference that establish the scope of the Inquiry and provide direction to the Tribunal about matters for consideration in the course of the Inquiry. The Tribunal does not have the power to make decisions as part of its Inquiry function but may make any recommendations it considers appropriate to the Minister.

11. An example of the Tribunal's Inquiry function is the Valour Inquiry. By its Terms of Reference, the Tribunal (the Valour Tribunal) was tasked to inquire into and report on the appropriate recognition for specific acts of gallantry or valour performed by thirteen deceased servicemen, including Sheean. [18] [19]

The Tribunal's Review Function

12. The Tribunal's Review function is quite different to its Inquiry function. If an application is properly made to the Tribunal, pursuant to s 110VB(1) of the Act, the Tribunal has jurisdiction to review a 'reviewable decision'. That term is defined in s 110V(1) of the Act and includes a decision made by a person within the Defence Force to refuse to recommend a person for an honour in response to an application.

13. In undertaking a review, the Tribunal carries out an independent merits review of the facts against the eligibility criteria for the honour or award sought. It undertakes an examination of the merits of the matter in dispute, rather than the lawfulness of the decision under review.[20] There is no presumption that the decision under review was correct.[21] The Tribunal determines matters by reference to the relevant legislation, with particular consideration of natural justice, rather than in the technical rules relating to onus of proof.[22] It is for an applicant to put forward the evidence which he or she wishes the Tribunal to

[18] Valour Inquiry, p. ix.
[19] The Tribunal observes that the Valour Inquiry's Terms of Reference directed it to review the actions of the members in the context of the criteria for Australian and Imperial awards and make recommendations in order to arrive at a 'fair and sustainable response to claims for appropriate recognition'. It was unclear why the Valour Tribunal was directed to review the actions against the criteria for Imperial awards, when, at the time of the Inquiry, no Imperial awards were able to be awarded, the dual Imperial and Australian honours systems having come to an end in 1992.
[20] *Council of Australian Tribunals* Practice Manual dated 7 April 2006 p.1.3.1.2.
[21] Ibid.
[22] *McDonald v Director of Social Security* 919840 1 FCR 354.

consider,[23] and it is for an applicant to establish that the claims are made out.[24] [25] The Tribunal is entitled to take into account facts and circumstances up until the time of review.[26]

14. The object of a merits review is to ensure that the 'correct or preferable' decision is made on the material before the review body: per Brennan J in *Bushell v Repatriation Commission.*[27]

15. Very recently, the High Court discussed the nature of administrative merits review, albeit in the context of the Administrative Appeals Tribunal.[28] The Court's observations are relevant to all administrative review tribunals:

> *....The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review. The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision...*[29]

16. In the Review of Commonwealth Merits Review Tribunals, the Administrative Review Council in its 'Better Decisions' Report to the Minister for Justice described review tribunals' function as follows:[30]

> *... review tribunals exercise the same statutory powers and discretions as the original decision maker. However, they will often be asked to consider new or more detailed information. ...*
>
> *... A review tribunal's principal focus is on the reconsideration of the merits of the particular cases before them, and on the rights or responsibilities of individual applicants as prescribed by law. Tribunals ... are generally in a better position than agency decision makers to fully consider the law and facts in each individual case, and may therefore be less reliant upon policies or guidelines in deciding the appropriate outcome.*[31]

17. A tribunal's exercise involves the weighing of the relevant factors to reach a reasoned conclusion in the circumstances of each case. That said, it is often recognised that tribunal decisions have a 'normative effect' on departmental decision-making.[32]

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[23] Minister for Immigration & Citizenship v SZGUR [2011] HCA 1 at [83]- [84]; see also SZBEL v Minister for *Immigration* and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152 at 164, [40](Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ).

[24] *SZBEL* [2006] HCA 63; (2006) 228 CLR 152 at 164, [40].

[25] See also discussion by Hon. Justice Duncan Kerr Chev LH, then President of the Administrative Appeals Tribunal, paper delivered at AIAL Seminar, Sydney, 27 August 2013.

[26] *Shi v Migration Agents Registration Authority* [2008] HCA 31.

[27] [1992] HCA 47; (1992) 175 CLR 408 at 425; [1992] HCA 47.

[28] *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16 (15 May 2019) per Bell, Gageler, Gordon and Edelman JJ at [51]. See also [14] per Kiefel CJ, Keane And Nettle JJ at [14].

[29] *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [142].

[30] 1995 - https://www.arc.ag.gov.au/Documents/ARC+DEFENCE REPORT+39.pdf.

[31] Ibid. at 2.54 - 2.59.

[32] Peter Cane and Leighton McDonald, 'Principles of Administrative Law' (Oxford University Press, 2008) at 247 – 248.

18. In this matter, Admiral Noonan's letter of 31 July 2018 is the reviewable decision. Clause 35 of *Defence Regulation 2016* specifies that for the purposes of s 110T of the Act a defence honour includes the VC. Consequently, the Tribunal has jurisdiction to conduct a merits review. Where, as in this matter, an applicant seeks a defence honour, the Tribunal does not have the power to affirm or set aside the decision but only to make recommendations regarding the decision to the Minister.

Evidence and Findings from the Accounts of the Action

19. The Valour Tribunal canvassed the evidence available to it in respect of Sheean's actions and found that:

- after assisting [Able Seaman] Pellet in releasing the motor-boat, instead of obeying the order to abandon ship, Sheean, a loader of *Armidale*'s aft Oerlikon, proceeded to this weapon to single-handedly engage the enemy,
- around this time, Sheean was wounded by the attacking Japanese aircraft,
- Sheean then strapped himself to the after Oerlikon, and used this weapon to shoot down at least one Japanese aircraft, and
- Sheean remained at his weapon until he was killed.[33]

20. Notwithstanding these earlier findings, and in accordance with its legislative obligations to conduct a merits review, this Tribunal was concerned to establish if the findings of the Valour Tribunal represented the best evaluation of the available evidence. What follows is a summary of the main elements of the evidence relevant to this Application for Review.

21. **HMAS *Armidale* Report of Proceedings (ROP).** The actions of Sheean were officially recorded by Lieutenant Commander DH Richards, RANR, the Commanding Officer of HMAS *Armidale* in the ROP as follows:

> *Ordinary Seaman Sheehan [sic], although wounded, remained at his post at the after Oerlikon, and was responsible for bringing down one enemy bomber. He continued firing until he was killed at his gun.*[34]

22. **Eyewitness Accounts of Sheean's Actions.** Sheean's actions were witnessed by a number of his shipmates.

[33] Valour Inquiry, p. 230 [17-138].
[34] HMAS *Armidale* Report of Proceedings (ROP) 29/11/42 to 1/12/42 dated 11 December 1942.

23. On 2 April 1945, Ordinary Seaman Russell Caro described in some detail the loss of *Armidale* in an article entitled *'We Lost a Corvette'* published in *'The Australian Journal'*.[35] In his notes for the article he wrote:

> *During the attack a plane had been brought down and for this the credit went to Ordinary Seaman Teddy Sheean. Teddy died, but none of us who survived, I am sure, will ever forget his gallant deed which won him a Mention in Despatches. He was a loader number on the after Oerlikon gun. When the order 'Abandon ship' was given, he made for the side, only to be hit twice by the bullets of an attacking Zero. None of us will ever know what made him do it, but he went back to his gun, strapped himself in, and brought down a Jap plane, still firing as he disappeared beneath the waves.*[36]

24. Author Frank Walker interviewed a number of eyewitnesses and took statements from members of *Armidale's* crew[37] in the 1980s when he was conducting research for his book *HMAS Armidale: the ship that had to die*.[38] He provided copies of the hand written statements and transcripts of the interviews to Mr Sid Sidebottom MP and these were included in Mr Sidebottom's submission to the Valour Inquiry.[39] They were also available to this Tribunal. Although not all statements were signed, each provided a description of some of Sheean's actions from the perspective of each of the witnesses.

25. In particular, the Applicant invited the Tribunal's attention to aspects of some of the witnesses' statements.

26. Ordinary Seaman Victor (Ray) Leonard recalled that immediately after he abandoned the ship and began swimming away, he could recognise the distinctive sound of *Armidale*'s Oerlikon gun firing.[40] He estimated that Sheean fired the Oerlikon for a minute or two.[41] He said that he and other crew members in the water were fired upon by enemy machine guns and that he saw the ship sink.

27. Leonard also said that he met up with Caro in the water shortly after the ship sank. Caro 'spontaneously' told him and others, then and when they regrouped with some of the surviving crew aboard the motor-boat, that he had seen Sheean firing the aft Oerlikon gun at attacking planes and saw Sheean, still at his gun, go down with the ship. Leonard said other crew members in the motor-boat told him the same thing. Leonard told the Valour Tribunal that when survivors were in the whaler on the long journey to Darwin there was much discussion about Sheean's actions. He also said he had read Caro's article at about the time it was published and it was substantially the same as what Caro had told him immediately after the ship sank.

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[35] *The Australian Journal* April 1945.
[36] R. Caro, *Notes for Article*, The Australian Journal, 2 April 1945.
[37] Wireman William Noel Lamshed, Ordinary Seaman Victor Raymond Leonard, Ordinary Seaman Donald Rex Pullen, Ordinary Seaman Colin Frederick Madigan, Stoker Ray Beresford Raymond, Leading Signalman Arthur Lansbury, Able Seaman Keith Pellet.
[38] Frank Walker, *HMAS Armidale: the ship that had to die*, Kingfisher press, NSW, 1990.
[39] Valour Inquiry, *Submission 128*, Mr Sid Sidebottom dated 5 December 2012.
[40] Valour Inquiry, *Submission 95*, Dr Victor Leonard dated 27 June 2011.
[41] Dr Peter Williams, *Interview with Dr Leonard*, Kew, VIC, 30 August 2011.

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28. HMAS *Armidale*'s Gunnery Officer, Lieutenant Lloyd Palmer, RANVR, recorded as follows:

> *Ordinary Seaman Teddy Sheean was responsible for [shooting down] one plane in the last attack. He was a loader number at the aft Oerlikon gun and when the order was given to abandon ship, he made it to the side but was wounded by a machine gun bullet. He returned to his gun and started firing again, bringing down one plane, but again was wounded and went down with the ship.* [42]

29. Ordinary Seaman Colin Madigan said:

> *My action station was on the bridge in the ASDIC*[43] *cabinet and when the order 'Abandon Ship' was given, I had difficulty extricating myself from my Mae West which was inflated. I could hear Teddy Sheean's Oerlikon firing all the time and when I eventually got into the water, I saw tracer shells coming up from under the surface. He had gone down with the ship and was still fighting.* [44]

30. Stoker Ray Raymond said:

> *The after section righted itself from the tilt and the after Oerlikon came into sight being manned by Ted Sheenan (sic), who was still firing the gun, which resulted in him shooting down one Japanese plane and damaging possibly two others.* [45]

31. Raymond also wrote:

> *As the ship broke in halves (sic) both sections sank from the centre with the result that Ted Sheean was still firing the Oerlikon gun as the after section of the ship disappeared below the surface...*

32. In his conversation with author Frank Walker, Leading Seaman Arthur Lansbury said that following the order to abandon ship he:

> *saw Teddy Sheean go back and he strapped himself into the Oerlikon. He was abandoning ship and I thought he was hit but Teddy (Pellet) told me he was on his way back to the gun when he was hit.* [Lansbury reportedly demonstrated to Walker that Sheean was hit on his back.] *Lansbury said Sheean went back and strapped himself into the Oerlikon. ... He must have known he was going down with the ship. He just kept firing as the ship went down. He just kept his fingers on it* [the firing mechanism] *and that was it.* [46]

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[42] Sullivan, John, *"The Loss of HMAS Armidale"* http://www.navy history.org.au/the-loss-of-hmas-armidale. The account states how the author was given command after the Captain left in the motor-boat, and the ROP and the Official History (Folio #280) record that that person is Palmer.

[43] ASDIC is a sonar system for submarine detection developed during and after the First World War.

[44] Statutory Declaration by Colin Madigan, Attachment C3 to Valour Inquiry *Submission 78*, Garry Ivory dated 21 June 2011.

[45] Statement by Ray Raymond to the Valour Tribunal dated 31 May 2008.

[46] Transcript of interview Walker/Lansbury/Pellet/McKellar.

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33. In his conversation with Frank Walker, Able Seaman Ted Pellet said:

> *Sheean and I were both together. We made for the motor-boat. I had a tommy-axe in my hand and I chopped the after fall and Sheean was right alongside me. They were strafing us at the time. He was going to get into the motor-boat with me. He was right alongside me, then he made a decision to go back and have a go at them...*[47]

34. Mr Grant Sheean gave evidence that, at a social gathering in 1992, Pellet told him that, at the time of the engagement, Sheean was standing beside him [at the motor-boat] and, before Sheean turned back to the gun, he had not been wounded. Mr Sheean's evidence about this conversation was unchallenged, and was not the subject of any submissions by the Respondent.

35. In an interview in 2011 Wireman William Lamshed said that following the port side being hit, 'he was thrown into the water on that side of the ship'.[48] He said that he saw the Oerlikon gun firing, but he did not know at the time that it was Sheean who was firing. This was consistent with his account in an earlier statement made on 1 June 2002.[49] He also wrote of having seen tracer rounds hitting a dive-bombing Zero aircraft. Lamshed, in his statements also wrote that he heard the Oerlikon firing and saw tracer rounds hitting one of the enemy planes.[50] He said the gun was still firing as the ship sank under the water. Lamshed, in 2002, said that it was when the survivors reached the motor-boat that he learned that it was Sheean operating the Oerlikon gun which he had seen shoot down a Zero.[51]

36. Ordinary Seaman Donald Pullen also wrote that as he swam away from the ship and was being strafed, he heard firing, which he had, at that time, assumed was from the enemy.[52]

37. **Reliability of the Available Evidence.** The Tribunal was concerned that, notwithstanding the investigations - both formal and informal - into Sheean's actions over the years, the available evidence remains limited. The Tribunal considered it highly unlikely that now, over 75 years later, any further reliable first-hand accounts would be located or otherwise become available. There is, reportedly, now only one survivor of *Armidale*'s sinking – Dr Victor (Ray) Leonard.

38. Leonard told the Valour Tribunal that on the whaler's return to Darwin the survivors were instructed to have no discussion about what had occurred, especially because of the (documented) delay in mounting a rescue and the consequent additional loss of life. Lamshed also referred to having been warned to say nothing about what had occurred. The Tribunal is not in a position to determine the accuracy of these assertions, but if correct, they may explain the lack of contemporaneous evidence which might have further detailed Sheean's actions. The Tribunal observes that although a Naval Board of Inquiry was conducted following

[47] Ibid.
[48] Dr Peter Williams, *Interview with Bill Lamshed*, Mildura, VIC, 2 September 2011.
[49] William Lamshed, *Account of the Sinking of HMAS Armidale* dated 1 June 2002.
[50] Ibid.
[51] Ibid.
[52] Letter from Rex Pullen dated 21 May 1968.

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Armidale's sinking, it focussed on the operation and the actions taken by those in command and was not concerned with medallic recognition of individuals.[53]

39. In evaluating the material before it, the Tribunal was concerned that the available evidence was of variable reliability. Ordinarily, considerable weight would be given to an official account, however the mention of Sheean in the ROP was very brief, and as discussed later, somewhat inaccurate. Independent contemporaneous eye witness accounts are usually given significant weight. Original statements are generally preferred to accounts in publications; which sometimes, regrettably, do not attribute sources, or record as 'facts' information that may have been influenced in support of the authors' themes. These accounts must therefore necessarily be viewed with some caution.

40. Of the available eyewitness accounts, Caro's 1945 notes for the journal article, are nearest in time to the events.[54] The account in the article, according to Leonard, was substantially the same as what Caro had told him immediately after the sinking while they were in the water. The Tribunal regarded the evidence of Leonard as helpful in corroborating Caro's account of what he had seen. Similarly, Leonard said there had been discussion in the whaler about Sheean's actions, and these discussions were independent of what he had been told by Caro. The Tribunal observed that Leonard had said that Caro had also reported Sheean's actions to other survivors. For these reasons, the Tribunal placed more weight on Caro's account (other than in relation to Sheean's firing underwater which is discussed later) than some of the other accounts.[55]

41. That is not to say those other accounts have been disregarded. On the contrary, for the most part, the accounts demonstrated a degree of consistency. Minor discrepancies did not, in the Tribunal's view, detract from the overall reliability of the evidence. Further, those eyewitnesses who provided multiple accounts also gave consistent narratives over a long period of time.

42. While there was a concern that the evidence of Lansbury and Pellet may be less reliable because Walker conducted a joint interview and arguably led the witnesses in their observations, their accounts were broadly consistent with the other evidence.

43. The Tribunal noted that the description provided by the eyewitnesses and what was recorded in the ROP with respect to Sheean differ in two important aspects:

a. Firstly, Sheean did not 'remain at his post' as the ROP recorded. After the order to abandon ship was given, from the eyewitness accounts, Sheean went to the motor-boat in preparation to abandon ship but then decided to return to the gun rather

[53] Gill, *Royal Australian Navy 1942-1945*, p. 222.
[54] Caro, *Notes for Article.*
[55] Duckworth, Raymond, Pellet and Lansbury (1980s), Leonard, 1980s and his evidence to the Valour Tribunal in about 2011, and written submission dated 2 August 2017, at Folio #290, Palmer (1983), Lamshed (2002 and 2011), Pullen (2005), and Madigan (2008).

than abandoning ship with other members of the ship's company. The evidence therefore indicates that he left his action station, made his way to the motor-boat, and then made a conscious decision to return to his action station.

b. Secondly, Sheean's designated action station was as the loader at the aft Oerlikon, not as the gunner. There is no evidence that he had ever fired the gun or been trained to do so. The Tribunal notes that Dr Lewis, in his written submission speculated that the four crew members ordinarily involved in operating an Oerlikon gun would have been likely to have alternated positions, partly for experience and partly to relieve the heavy physical exercise, which varied according to their role. The Tribunal accepts that Sheean would have been likely to have some knowledge of the firing process because of his training as a loader on the Oerlikon gun, notwithstanding that he was not the designated gunner.

44. Having reviewed all of the available evidence the Tribunal prefers the eye-witness accounts and accordingly finds that Sheean did not 'remain at his post' as recorded in the ROP. The Tribunal further considers that the ROP understates Sheean's actions, and observes that the Respondent conceded that the account of Sheean's actions in the ROP was more of 'a summary or overview' and, on the basis of eyewitness accounts, did not provide the full picture of Sheean's actions. Accordingly, the Tribunal finds that the ROP, which formed the basis of the consideration of Sheean's medallic recognition following the events of 1 December 1942, understated Sheean's actions.

45. The Tribunal concludes that the eye witness accounts are, in this matter generally reliable, and when taken together, provide an accurate description of Sheean's actions on 1 December 1942.

Clarification of the Evidence

46. As discussed at the hearing, there remained some minor disparities in the various accounts of Sheean's actions, which the Tribunal endeavoured to explore.

47. **Sheean's decision not to abandon ship.** Admiral Noonan gave evidence that, in his view, given the damage to *Armidale* prior to the order to abandon ship, there would have been casualties and significant damage around the ship. He said that Japanese aircraft would have continued to bomb, strafe, and torpedo the ship and it would have been a 'very confused environment'. He said that the decision to abandon ship would not have been taken until it was clear to the Captain that the ship was unable to fight any longer. He said that the ship's company would have appreciated why the decision to abandon ship had been taken.

48. Admiral Noonan said that a decision to abandon ship is not one that is taken lightly in any circumstance. He said it represents, in the Captain's view, that the ship is about to be lost, and that those who are able to save themselves should do so. He said it is a Captain's 'absolute expectation' that the ship's company will follow the order to abandon ship.

49. As to why Sheean had decided to return to the Oerlikon gun and not abandon ship as ordered, Admiral Noonan was unable to speculate. In the Defence Report, the Respondent conceded though, that the effect of Sheean's decision to turn back to the Oerlikon was that he had deflected the attention of the strafing pilots, even if only for a few seconds, drew fire and saved lives.[56]

50. **When and to what extent was Sheean wounded?** The evidence is that Palmer, the Gunnery Officer, reported that Sheean was wounded by a machine gun bullet after he 'made it to the side' and was again wounded after he returned to the gun. Lansbury thought that Sheean was hit on his back and said that Pellet told him Sheean was on his way back to the gun when he was hit. Pellet himself made no direct comment about Sheean's wounding until he reportedly told Grant Sheean in 1992 that Sheean had been standing beside him [at the motor-boat] before Sheean went back to the gun and Sheean had not been wounded at that time.

51. In an ABC interview with war correspondent Peter Hemery,[57] Able Seaman Jack Duckworth said that Sheean suffered 'a row of machine gun bullets right across the chest' before he went back to the gun.[58] The Tribunal considered this to be improbable - if Sheean were so extensively wounded it is unlikely he would have been able to get to the gun, strap himself in, then undertake the physically demanding task of firing the weapon.

52. Dr Lewis speculated that Sheean would have been wounded by a machinegun bullet, or a cannon shell or shrapnel, any one of which, in his view, would inflict a 'serious' wound.[59] In his written submission Dr Lewis wrote that the metal shield of the gun and the issued helmet (if it in fact was worn) provided little protection.[60]

53. The Tribunal considered that, on balance, it was more likely that Sheean was not wounded while at the motor-boat, and was only wounded while returning to, or while at the Oerlikon gun. The Tribunal concluded that there was no persuasive evidence for it to come to a view as to the seriousness of Sheean's wounds and his consequent degree of incapacity.

54. **How long was Sheean firing the Oerlikon Gun?** In this context, the Tribunal considered whether Sheean was likely to have reloaded the Oerlikon gun in order to continue firing. The ROP contained no information about when the ship's company might have taken up action stations when attacked and to what extent the aft Oerlikon had been firing before the order was given to 'abandon ship'. However, the ROP recorded that Japanese planes had been sighted at 1450, and at 1505 had taken up position to attack *Armidale*. It is reasonable to conclude that from at least 1505 the gun crews were in position and ready to attempt to

[56] The Defence Report dated 5 February 2019, p. 14, para. 50(i).
[57] Transcript available to the Tribunal and the parties but not relied on by either party, (see RANCA letter to DHAAT dated 7 March 2012) Folio #193, Date unknown but located in Duckworth's papers after his death in 1988.
[58] Transcript of ABC radio interview Hemery/Lansbury/Duckworth located in Duckworth's papers on his death in 1988.
[59] Oral Evidence by Dr Lewis, Hobart, 26 March 2019.
[60] Dr Lewis, *Written Submission* dated 15 March 2019.

repel the enemy aircraft, and that they remained at their action stations, constantly engaging the enemy, and reloading as necessary, until the order was given to abandon ship.

55. As to whether it was possible that Sheean reloaded the Oerlikon at some time after his return to the gun, Dr Lewis speculated that Sheean would have had plenty of ammunition available to him as additional magazines would have been accessible from the ready use ammunition locker located near the gun.[61] Dr Lewis concluded that it was possible for Sheean to have reloaded the gun with a fresh magazine. Dr Lewis however did not agree that if Sheean were wounded, it would have been unlikely that he had in fact replaced the magazine.

56. Admiral Noonan's evidence, on the other hand, was that the Oerlikon gun is a heavy and robust piece of equipment, ordinarily manned by a gunner, a loader and a supervisor and that fully loaded magazines were extremely heavy.[62] Drawing on his personal experience as a gunnery officer at sea, he said that he did not think it would have been possible for Sheean to reload the Oerlikon gun on his own. The Tribunal preferred Admiral Noonan's evidence to that of Dr Lewis in this regard.

57. Dr Lewis, in his written submission to the Tribunal noted that the physical position of the gunner would be behind the weapon in a harness fitted with a waist-belt and shoulder supports.[63] The Tribunal observed that several witnesses referred to Sheean having 'strapped himself in' to the Oerlikon. It is the Tribunal's understanding that this refers to the standard procedure undertaken to facilitate firing the Oerlikon gun, particularly when at maximum elevation. The Tribunal accepts that Sheean is likely to have adopted this firing position and strapped himself into the gun.

58. The Tribunal considered that after Sheean strapped himself into the gun, even if he were not already wounded, he would not have been able to easily extricate himself so as to load a new magazine when he had expended the fitted one. It is therefore likely that he was limited to firing whatever number of rounds that were left in the fitted magazine and not expended when the order to abandon ship was given. The Tribunal notes that the maximum number of rounds in an Oerlikon magazine was 60.[64]

59. The Tribunal also accepts the Respondent's contention that if Sheean had fired continuously he would have only been able to fire for about 10 - 15 seconds.[65] The ROP suggests that the ship sank within a short time after first being hit, hence, depending on when he commenced firing, he may not have had the opportunity to fire for very long. Leonard, for example, estimated that Sheean fired for one to two minutes.[66] The Tribunal accepts that if Sheean had only intermittently squeezed the trigger, firing duration may have been prolonged.

[61] Oral Evidence by Dr Lewis, Hobart, 26 March 2019.
[62] Oral Evidence by Admiral Noonan, Hobart, 25 March 2019.
[63] Dr Lewis, *Written Submission* dated 15 March 2019.
[64] http://www.navweaps.com.Weapons?WNUS_2cm-70_mk234.php.
[65] The Defence Report, p. 14, para. 50(i).
[66] Dr Peter Williams, *Interview with Dr Leonard*.

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60. The Tribunal also accepts the Respondent's submissions at hearing that accurate calculation of time, particularly when in extremely perilous circumstances or under fire, can be problematic.

61. In view of the above observations, the Tribunal is unable to come to a final view about how long Sheean may have been firing and concluded that he may have only been engaging the enemy for one to two minutes.

62. **How long did it take for *Armidale* to sink?** The Respondent stated that none of the eyewitness reports had really focussed on the question of how long Sheean was at the gun and that any estimate is likely to be imprecise.[67] The Respondent made submissions about the time taken from when the ship was torpedoed until it sank. The Tribunal noted that the ROP recorded that *Armidale* was attacked first by five aircraft at 1315 but sustained no damage. At 1450, nine bombers, three fighters and a float plane were sighted. At 1505 the aircraft took up position to attack. The ROP states that at 1515 the ship was struck by two torpedoes and possibly one bomb. Lieutenant Commander Richards estimated that the ship sank within three to four minutes.[68] Pullen also estimated four minutes.[69]

63. In his evidence Dr Lewis said that a corvette like *Armidale* with no armour would sink 'quickly', estimating that it would occur perhaps within as little as one to three minutes of being torpedoed. However, later in his evidence Dr Lewis revised this estimate - on the basis of his own naval experience, he claimed that the ship would have sunk within ten to fifteen minutes from the time of impact of the first torpedo.

64. In the Tribunal's view, after the ship had been torpedoed, it would have been difficult for the gravity of the situation to have been assessed, a decision reached to give the order to 'abandon ship', that order conveyed around the ship, for the ship's company and passengers to move to the motor boat, and the motor-boat successfully launched; all within the three to four minutes estimated by Lieutenant Commander Richards.

65. Similarly, Raymond's evidence describes the action he took after the ship was torpedoed.[70] He said that the ship quickly listed to port and he made his way from the engine room and climbed the ladder to reach the deck. He said he then walked down the side to reach the water and swam approximately 40 yards. From there he observed that both sections of the ship were sinking from the middle with the front section sinking first.

66. Leonard's account was that on the order to abandon ship he undertook a (unspecified) task, and then swam away as fast as he could while impeded by his heavy boots and a partially inflated Mae West lifejacket, making a distance of about 70 yards from the ship before it sank.[71]

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[67] Commander Fothergill Oral Evidence, Public Hearing, Hobart 25 March 2019.
[68] HMAS *Armidale* ROP dated 11 December 1942.
[69] Dr Peter Williams, *Interview with Rex Pullen* 18 November 2005, para 2.
[70] Statement by Ray Leonard to the Valour Tribunal dated 31 May 2008.
[71] Dr Peter Williams *Interview with Dr Leonard* 30 August 2011.

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67. The Tribunal considered that the activities described by Raymond and Leonard are likely to have taken more than three to four minutes. The Tribunal therefore had reservations about the accuracy of Lieutenant Commander Richards' estimate of three to four minutes as the time from when the ship was hit to when it sank.

68. **Was Sheean firing the Oerlikon gun from under the water?** Caro's contention was that Sheean was firing the gun as he 'disappeared beneath the waves'.[72] [73] Madigan, in his statement, said he saw tracer shells coming up from under the surface.[74] Less dramatically, Lamshed wrote that he saw the gun still firing underwater as the ship sank and Lansbury said that Sheean was still firing as the ship went under.[75] The Respondent said, and the Tribunal accepts, that due to its design, the Oerlikon gun cannot continue firing under water. The Tribunal observed that the Valour Tribunal, having reviewed the operating manuals and drawings of the Oerlikon found that the weapon will not operate if the breech block is submerged due to the combined effect of water resistance slowing the breech block travel, and the significant reduction in the available pressure delivered by the gas.[76] The Tribunal reviewed the weapon's operating manual and accordingly, accepts the findings made by the Valour Tribunal in this regard.[77]

69. The Respondent also submitted that to a person in the water with limited visibility due to surface chop, the gun breech block may have appeared to have been underwater. The Tribunal accepts that this is a likely explanation of Caro's contention that Sheean was firing the gun as he 'disappeared beneath the waves' and Madigan's description of the firing continuing from below the water. The Tribunal also observes that, according to Raymond and Leonard, the ship sank from the centre, with Leonard recording that the stern sank last. Hence, in the Tribunal's view, those in the water may have been able to see Sheean at the aft gun, continuing to fire, notwithstanding the centre of the ship was sinking rapidly. Similarly, the Tribunal considers that some of the descriptions to the effect that Sheean was firing 'as the ship sank' – such as that by Lamshed and Lansbury - should not be read literally. It is consistent with all accounts that Sheean was firing while the ship was in the process of sinking.

70. Ultimately, the available evidence did not permit the Tribunal to come to a view about the period of time between Sheean's decision to return to the gun and his death.

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[72] Caro, *Notes for Article*.

[73] Caro's daughter reportedly informed Mr Halsted, President of the Royal Australian Navy Corvettes Association (NSW) Inc, that her father had told her that he had seen Sheean firing the gun and was still firing even after he and the gun were below water level.

[74] Statutory Declaration by Colin Madigan dated 28 May 2008.

[75] William Lamshed, *Account of the Sinking of HMAS Armidale* dated 1 June 2002, Folio #236.

[76] Valour Inquiry, p. 229 [17-136].

[77] Ordnance Pamphlet no. 911, 20 mm Anti-Aircraft Gun, 943, at www.forgottenweapons.com/wp-content/uploads/manuals/oerlikon_manual.pdf, viewed 18 September 2012. Drawings provided by the Maritime Trust of Australia Inc. (*Submission 261*).

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Conclusion in Relation to the Evidence

71. The Tribunal considers that taken together, the witness statements provide a broadly consistent account of Sheean's actions from the time he elected not to abandon ship up until the time he went down with the ship still strapped to the Oerlikon gun.

72. The parties agreed that an appropriate factual conclusion, outlined in the Defence Report, is as follows:[78]

> *When the order was given to abandon ship, Sheean went to the stowage position of the motor-boat and was witnessed on deck standing next to Able Seaman Edward Pellet who used an axe to chop one of the falls of the motor-boat. Despite the fact that Armidale was a doomed vessel, the Japanese aircraft were continuing to fire upon the ship's crew as they abandoned ship as well as those already in the water. As Pellet got into the motor-boat, Sheean was seen to move towards the side of the ship as if to abandon ship then turned and headed back towards the aft Oerlikon, which was his normal action station but as a loader not as the gunner. Pellet told Leading Signalman Lansbury that he saw Sheean hit (injured) as he made his way back to the gun which was some distance away. Lansbury saw Sheean make his way to the gun, strap himself in and commence firing. He also saw him get hit in the back by enemy aircraft fire. Stoker Ray Raymond was in the water 35-40 yards away from the aft section where, as it sank, he could see Sheean strapped into the Oerlikon. Raymond's account of Sheean actually shooting down one and possibly damaging other enemy aircraft accorded with that of Wireman William Lamshed who also witnessed the aircraft being shot at and hit by rounds from the aft Oerlikon but he did not know at the time that it was Sheean manning the gun. Raymond and others stated that they saw or heard the gun firing right up until it was under water.*

73. The Tribunal agreed that this was a reasonable synopsis of the facts, based on the available evidence.

CONSIDERATION OF SHEEAN'S ELIGIBILITY FOR A GALLANTRY AWARD

The Respondent's Submissions

74. The Respondent made detailed submissions both in the Defence Report and at the hearing in support of its position that Sheean should not be awarded further medallic recognition.

75. **Respondent's submission in relation to 'retrospective' honours.** In his letter dated 5 February 2019 Admiral Noonan acknowledged Sheean's 'conspicuous gallantry and self-sacrifice'. Nonetheless, he declined to reconsider the decision under review, relying on the Defence policy that no retrospective honours and awards would be considered unless it could be demonstrated that there had been maladministration, or compelling new evidence

[78] The Defence Report, p. 13, para. 48.

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presented that was not available to the decision-makers at the time.[79] Much of the Respondent's written submissions focussed on this policy. At the hearing the Respondent maintained its position that, as a matter of policy, in the case of a retrospective honour, unless one or both of the criteria are met, i.e. maladministration or new evidence, then no further consideration in the form of a merits review will be considered.

76. In *Green v Daniels*[80] the High Court acknowledged that policy guidelines may be provided for the benefit of delegates and in the interests of consistent administration, so long as these are consistent with the statutory criteria. However, while a decision-maker may take a general policy into account, in doing so they must not preclude themselves from considering a matter on its merits. Very recently, in *Minister for Home Affairs v G* [2019] FCAFC 79 the Full Federal Court (Murphy, Moshinsky and O'Callaghan JJ) discussed the effect of government policy with respect to administrative decisions:

> *The boundary is clear: policy is not to become a rule of law. The statute is the expression of the rule of law. Executive policy cannot, in form or more importantly in substance, be perceived by decision-makers as, or operate as, a rule....*

77. Government policy is a relevant consideration in a merits review by a tribunal, and it is usually applied in the absence of cogent reasons not to follow such policy.[81] The Respondent's policy, as the Tribunal understands it, is at odds with the eligibility criteria for the VC, and indeed, all of the Gallantry Regulations, and also with the Tribunal's obligations under s110VB of the Act. In undertaking a merits review, in accordance with the principles discussed above, the Tribunal is not concerned with the process adopted in 1942 in submitting Sheean for medallic recognition. Consequently, in looking at the merits of the present application, it is not necessary to establish whether there was any maladministration in the processing of an award recommendation in the past.

78. The policy adopted by the Respondent had its origins in the conclusions of the Valour Tribunal. In reaching a conclusion that retrospective awards should only be contemplated in 'the most compelling of cases', the Valour Tribunal, in the view of this Tribunal, had adopted a cautious approach.[82] It appeared that the Valour Tribunal did not contemplate how a decision-maker should examine a case to determine if it were 'most compelling'. Similarly, in the present matter, it appeared that the original decision-maker did not turn his mind to consider if this might be one such case, and instead relied on the policy the Respondent had formulated.

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[79] In the reviewable decision Admiral Noonan had stated a slightly different proposition, namely that he would not support a retrospective award for Sheean based on the recommendations contained in the Valour Inquiry and that no new evidence has been produced since the Valour Inquiry. In reaching this position, Admiral Noonan was informed by the considerations whereby the Valour Tribunal examined the official Navy administrative process that was in place at the time of the original decision and that the process had been followed and no new compelling evidence had been found that had been presented subsequent to the Inquiry.

[80] [1977] HCA 18; (1977) 51 ALJR 463 per Stephen J at [28], p467.

[81] *Drake and Minister for Immigration and Ethnic affairs (No 2) (1979) 2 ALD 634 at 645.*

[82] Valour Inquiry, p.5 [E-18].

79. Further, the Respondent also submitted that there was no legislative requirement for it to conduct 'a merits review'.[83] However, the Tribunal considers it inappropriate to describe the consideration of an application for an honour as a 'merits review'. A decision-maker has an obligation to properly address an application.[84]

80. In his oral submissions Admiral Noonan acknowledged that Sheean displayed bravery and selflessness in the face of mortal danger while *Armidale* was under attack on 1 December 1942. Nonetheless, it was Navy's position, consistent with Defence policy, that the Tribunal is the most appropriate decision-making forum for retrospectively determining whether an individual's actions are deserving of an award for gallantry.[85] The Tribunal considers that this view is inconsistent with the role of an original decision-maker in response to an application for an honour. It is incumbent upon the decision-maker to identify the law that must be applied, establish the relevant facts and apply the law to those facts. To place complete reliance on an earlier consideration, without fresh evaluation, ignores the important responsibility given to a decision-maker.[86] [87] Simply put, as a matter of procedural fairness, an original decision-maker should make his or her own assessment of the merits of an application.

81. Whilst the Respondent's position was the Tribunal is best placed to undertake a merits review, the availability of a review process is not a panacea for proper decision-making in accordance with the well-established principles of administrative law.

82. The above remarks are intended to assist the Respondent in better decision-making with respect to honours. In a paper by (now Federal Court Justice) Alan Robertson QC[88] the following observations were made about the role of tribunals in assisting administrative decision-making:

> *The administrative law system strengthens government administration by improving the quality of primary decision making. It increases the awareness of decision makers of the legal constraints under which they operate and the factors they should take into account in making decisions ... The [Administrative Review] Council refers to this as the normative effect of administrative review.*

[83] The Defence Report, p. 8, para 25.
[84] This contrasts with s110VC of the Act whereby the Tribunal may dismiss an Application for Review if, relevantly, it considers the question of whether the person should be recommended for an honour has already been adequately reviewed.
[85] Chief of Navy letter to DHAAT dated 5 February 2019.
[86] See Administrative Review Council best Practice Guide: https://www.arc.ag.gov.au/Publications/Defence Reports/Pages/Downloads/ARCBestPracticeGuide3EvidenceFactsandFindings.aspx.
[87] See also Kiefel J in *Tickner v Chapman* (1995) 57 FCR 451 at 495, [40] and *Hindi v the Minister of Immigration and Ethnic Affairs* [1988] FCA 346 per Shepherd J at [35] that a delegate must give "proper, genuine and realistic consideration to the merits of the applicant's case".
[88] *Administrative Justice in the 21st Century:* papers presented at International Conference on Administrative Justice (1997: Bristol, England) edited by Michael Harris, Martin Partington, Hart Publishing, Oxford 1999, Monitoring developments in Administrative Law at p 501.

The outcome of a review of an administrative decision on its merits may have an immediate effect, not only on the decision under review, but in correcting erroneous decision making practices of highlighting misconceptions that arise within administration....

83. Review tribunals provide review of individual decisions; they are not charged with reviewing or developing government policy. Nevertheless, some review tribunal decisions raise issues that have broader significance and potential long-term impact on government administration. Advantage can be taken through tribunals' Reasons for Decision to improve the quality of future agency decision-making so as to benefit all those subject to the regulatory regime addressed in a tribunal decision.[89] In his oral evidence Admiral Noonan appeared to welcome the opportunity for improving future decision-making about honours and awards.

84. **Respondent's submission in relation to 'integrity of the system'.** The Respondent submitted that the integrity of the honours and awards system must be based on the strict application of the eligibility criteria in each case.[90] The Tribunal considers that that submission reflects the proper role of the original decision-maker and, on review, the Tribunal.

85. The Respondent relied on the Valour Tribunal's conclusion that the gallantry decorations system, and in particular, the VC, should not be used to grant public recognition to individuals who had performed some act of gallantry but did not meet the stringent conditions for such an award.[91] The Tribunal agrees with this observation, and considers that it is consistent with the Tribunal's fundamental obligations in conducting a merits review. Arguments such as 'no member of the Australian Navy ever having been awarded a VC'[92] have no relevance in the conduct of a merits review. Similarly, that Sheean has been recognised in many forms other than through medallic recognition is also not a valid consideration in the course of a merits review.[93]

86. The Valour Tribunal in determining not to recommend an honour for Sheean applied a number of tests through what Admiral Noonan described in his evidence as the 'prism of maintaining the integrity of the Australian honours and awards system'. While its Terms of Reference included an opportunity for it to conduct a merits review, the Valour Tribunal considered that it could only do so after it had undertaken a process review.[94] When it found there was no maladministration or compelling new evidence, it nonetheless purported to

[89] Administrative Review Council Defence Report to the Minister for Justice: "Better Decisions: Review of Commonwealth Merits Review Tribunals 1995" p10.
[90] The Defence Report, p. 6, para. 16.
[91] Valour Inquiry, Chap. 8.
[92] The Defence Report, p. 7, para. 19.
[93] HMAS *Sheean* is the only one of the Royal Australian Navy's ships to bear the name of an ordinary seaman. The Ordinary Seaman Teddy Sheean Gunnery Award is given at HMAS *Cerberus* for the sailor with the best result on the quartermaster and boatswains mates course. There is also the iconic 1978 painting by Dale Marsh which hangs in the Australian War Memorial. In 2003 the Australian Navy Cadet unit, TS *Sheean*, was established in the Noosa Shire, and is now permanently located in Tewantin, Queensland. There is also the Teddy Sheean Memorial and Sheean Walk in his home town of Latrobe, as well as the Tasmanian Government's Teddy Sheean Memorial Grants Program. His face is also on badges sold by the RSL for its annual Anzac Appeal.
[94] Valour Inquiry, p. 91 [8-46].

undertake a merits review, but, in this Tribunal's view, in the course of its discussion of the evidence, again focussed on whether there had been maladministration. The Valour Tribunal considered that it was being asked to place itself in the shoes of those who had been responsible for recommending honours in the past. It did not however address the eligibility criteria, either in relation to the Imperial VC, or the VC, nor any of the other contemporary Australian honours, having taken the view that only the honours available posthumously at the time of the Sheean's death, namely the Imperial VC and the MID, could be considered.[95] With respect, this approach overlooks that the full suite of contemporary honours was available at the time of the Valour Inquiry.

87. The Respondent also made detailed submissions to the effect that in order to maintain the integrity of the honours and awards system 'current processes and philosophies' should not be used to overturn or challenge historical decisions in the absence of a flaw in the historical administrative process, or new evidence upon which to re-assess the situation.

88. The Valour Tribunal specifically stopped short of setting parameters for the award of the VC and considered that it should apply the standards and expectations that the Australian community in the past had come to accept, but offered no guidance in this regard.[96] This approach is at odds with the specific direction in s 110VB(6) of the Act that the Tribunal apply the eligibility criteria that governed the making of the reviewable decision.

89. As to the standard of proof to be applied, in the Defence Report the Respondent wrote that if an act of gallantry can be comprehensively shown to meet the exacting criteria and be comparable to those of other personnel who have been (sic) similar awards, then such recognition would be 'warranted and supportable'.[97] In his oral submissions, Admiral Noonan spoke at length about the very high esteem in which Sheean is held in the modern Navy. The Tribunal accepts, unreservedly, that this is the case. However, the Respondent submitted that the integrity of an honours and awards decision means one that should pass a more rigorous test of acceptance by current and past ADF peers, but this is not the test which the law provides.

90. In the Defence Report the Respondent also submitted that in undertaking an assessment or review, that the standard of proof is one that 'conclusively identifies that the criteria have been met' in order that the original decision be set aside and a different award be made. This approach is incorrect. In *Briginshaw v Briginshaw*[98] the High Court held that, in cases involving the civil[99] standard of proof,[100] where grave and serious allegations have been made, a court [or tribunal] cannot come to a 'reasonable satisfaction' that the allegation has been established on the balance of probabilities unless the review body 'feels an actual persuasion' and feels 'comfortably satisfied'. Even the stricter criminal standard of proof requiring

[95] The Valour Tribunal concluded that had he lived, Sheen may have been recommended for a higher-level gallantry award, but that the equivalent level Australian honour should not be recommended now.
[96] Valour Inquiry, p. 76 [8-3].
[97] The Defence Report, p. 10, para. 35.
[98] (1938) 60 CLR 336.
[99] As distinct from the criminal standard.
[100] That is, on the balance of probabilities.

satisfaction 'beyond reasonable doubt', does not demand that the evidence be 'conclusive', as the Respondent contended.

91. The Respondent also submitted, and the Tribunal agrees, that the enduring integrity of the system could be enhanced as a review may demonstrate that those entrusted to maintain integrity are willing to do so through constant review and reflection. It is the Tribunal's strong view that the integrity of the system is served, and is in fact enhanced when, on a merits review, those who meet the eligibility criteria for an honour are appropriately recognised. The Respondent acknowledged this in its Defence Report:

> *It is therefore important that the integrity of the system is maintained and in fact bolstered through correcting some situations where serving and ex-serving personnel feel that there has been a noteworthy shortfall or mistake by the system.*[101]

Imperial and Australian Honours

92. Until February 1975, when the Government introduced the Australian honours and awards system, Australian service personnel received honours and awards under the Imperial system. Under the Imperial honours system in the Second World War, the only honours that could be awarded posthumously were the Imperial VC and the MID; the latter was awarded to Sheean. However, under the Australian system all Gallantry Decorations are available posthumously.

93. The two systems – the Imperial and the Australian - operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards.[102] This means that only contemporary decorations may now be recommended by the Tribunal.

94. **Victoria Cross Eligibility Criteria.** The VC was established by Letters Patent on 15 January 1991.[103] It is Australia's highest gallantry decoration for the purpose of:

> *according recognition to persons who, in the presence of the enemy, perform acts of the most conspicuous gallantry, or daring or pre-eminent acts of valour or self-sacrifice or display extreme devotion to duty.*

95. The honour is governed by Regulations set out in the Schedule:

> ***Conditions for award of the decoration***
>
> *3. The decoration shall only be awarded for the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.*
>
> ...

[101] The Defence Report, p. 10, para. 34.
[102] Prime Minister of Australia Media Release 111/92 dated 5 October 1992.
[103] *Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations* - dated 4 February 1991.

Making of awards

7. *Awards of the decoration shall be made, with the approval of the Sovereign, by Instrument signed by the Governor-General on the recommendation of the Minister.*

96. **Approval of the Victoria Cross for Australia**. The Tribunal notes that the decision to award gallantry decorations lies with the Governor-General on the recommendation of the Minister however, in relation to the VC, the award can only be made with the approval of Her Majesty Queen Elizabeth, Queen of Australia. [104]

What is Gallantry?

97. 'Gallantry' is an abstract term, which is not defined in the Regulations. Various dictionary definitions such as 'dashing courage; heroic bravery';[105] and 'courageous behaviour, especially in battle';[106] are largely circuitous and unhelpful. Some countries have attempted to differentiate between 'bravery' and 'gallantry'; defining the latter as recognition of military personnel who carry out acts which put their lives at risk while involved in operational service; whilst 'bravery' is defined as saving or attempting to save the life of another person in the course of which they place their own life at risk.[107] Again this is largely unhelpful in defining gallantry in the context of the Australian Honours and Awards system.

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

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

Was Sheean Gallant?

100. The Tribunal decided that, consistent with its statutory obligations, it would first determine whether Sheean's actions were gallant and, if such a finding were made, it would then assess what the most appropriate gallantry award should be to recognise that gallantry.

[104] Ibid.
[105] *The Macquarie Dictionary* on-line accessed 20 October 2017.
[106] *The Oxford Dictionary* on-line accessed 20 October 2017.
[107] http://medals.nzdf.mil.nz/category/d/index.html.

101. The Tribunal noted that in the Defence Report the Respondent's position was recorded as follows:

> *There is no doubt that Sheean's actions demonstrated gallantry under all of the guises of bravery, courage, heroism, valour and daring.*[108]

102. Admiral Noonan referred to survivors' statements in which Sheean's actions were described variously as: 'heroic behaviour', 'awe-inspiring', 'altruism', 'very brave', 'something really exceptional', 'one of the bravest things that could ever be recorded' through to 'idiotic'. The Tribunal considered that the most common view of the witnesses to the action was that Sheean's actions constituted heroic behaviour.

103. In his evidence, Admiral Noonan said that, if he were presently informed of a nomination for a gallantry award, detailed as described in the Defence Report, he considered that it would satisfy him as a suitable citation for a gallantry award.

104. The Tribunal considered that the level of threat to *Armidale* and the ship's company was extreme in that the ship was sinking and the survivors in the water were being strafed. Sheean undertook an action which was above and beyond what was expected of him as an individual in returning to man the Oerlikon gun, which was beyond his responsibility, particularly in circumstances where the order had been given to 'abandon ship'.

105. The risk to Sheean personally was also extreme. In electing not to board the motor-boat as the ship was sinking, he could have had little prospect of survival. Admiral Noonan's evidence, which the Tribunal accepts, was that on the order to 'abandon ship', it is the expectation that the ship's company will obey that order immediately. The Tribunal considered that Sheean's action in returning to the Oerlikon gun was selfless and taken in the interests of his shipmates and that his decision to return to the gun demonstrated a special and additional element of courage, beyond what was expected of him.

Conclusion as to Gallantry

106. Having considered the evidence and reviewed his actions against the factors common in acts of gallantry, the Tribunal finds that Ordinary Seaman Sheean performed an act of gallantry in action on 1 December 1942 when he decided to forgo his opportunity for survival by not abandoning ship and instead return to the Oerlikon gun to engage enemy aircraft.

Sheean's Eligibility for the Victoria Cross for Australia

107. Having found that Sheean performed an act of gallantry, the Tribunal turned to an assessment of his actions against the eligibility criteria for the honour sought by the Applicant, namely the VC.

[108] The Defence Report, p. 14, para. 53.

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108. The conditions for the award of the VC require 'the most conspicuous gallantry, or a daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy'. The Tribunal considered that it is unfortunate that a plain reading of the Regulation gives rise to some ambiguity.

109. For example, the Applicant submitted that there were four alternative bases for consideration of a VC, only one of which need be satisfied, namely:

a. the most conspicuous gallantry,
b. a daring or pre-eminent act of valour,
c. self-sacrifice,
d. extreme devotion to duty in the presence of the enemy.

110. The Tribunal observed that the High Court in *Project Blue Sky Inc. v Australian Broadcasting Authority*[109] (*Project Blue Sky*) provided guidance as to dealing with ambiguity. The Court said that where conflict appears to arise from the language of particular provisions, the conflict can be alleviated by adjusting the meaning of the competing provisions to achieve a result that best gives effect to the purpose of the statute.

111. Consistent with the approach in *Project Blue Sky,* the Tribunal noted that the Letters Patent establishing the VC record the purpose of the honour to be:

> *... for according recognition to persons who, in the presence of the enemy, perform acts of the most conspicuous gallantry, or daring or pre-eminent acts of valour or self-sacrifice or display extreme devotion to duty.* [110]

112. The Tribunal therefore took a different view of the Regulation from that submitted by the Applicant, and decided that the correct interpretation of the Regulation is as follows:

a. for acts of the most conspicuous gallantry in the presence of the enemy,
b. for a daring or pre-eminent act of valour or self-sacrifice in the presence of the enemy,
c. for displaying extreme devotion to duty in the presence of the enemy.

113. Also, the Tribunal considered that it was clear that each of the circumstances set out in the criteria is required to have taken place in the presence of the enemy. In this matter there is no dispute that for the purposes of the Regulation, Sheean's actions were performed 'in the presence of the enemy'.

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[109] *Project Blue Sky Inc. v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (28 April 1998) at [78].
[110] *Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations* - dated 4 February 1991.

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114. **Did Sheean perform an act of the most conspicuous gallantry?** In *Hanuszewicz and the Department of Defence re: Cameron*[111] the Tribunal considered that to be 'most conspicuous', in the circumstances of that matter required that the individual's actions would have needed to have drawn the attention of the enemy. Whilst that may not be directly applicable to this matter, the Tribunal considers that the enemy's intentions and direct actions would be relevant to a consideration as to whether an act of 'the most conspicuous gallantry' had been performed.

115. There was no dispute that enemy aircraft were firing at *Armidale* and also strafing the survivors in the water. The enemy's intention was clearly to sink the ship and inflict maximum casualties upon those who were in the water. Similarly, there was no dispute that when Sheean decided to go back to the Oerlikon gun rather than abandon ship, he and his shipmates were under direct fire. Sheean was also undeniably under fire whilst he was actually manning the Oerlikon gun. The Tribunal also noted that the Respondent conceded that Sheean had 'drawn fire and thereby saved lives'.[112]

116. The Tribunal accepts that when Sheean returned to the gun and commenced firing, he shot down one aircraft and may have damaged others. In doing so he deflected the attention of the strafing pilots from those already in the water, even if only for a short period of time.

117. The Applicant's submission was that, in any event, the duration of Sheean's firing was not determinative, and the Tribunal agrees with this submission. There was no clear evidence as to the duration of his firing but the length of time the action was undertaken is not a criterion for assessing gallantry, although it can be a factor to be taken into account. More relevant than the actual duration of his firing, is the conclusion that Sheean continued firing until he was no longer able to do so - either because he had been so severely wounded or because the ship sank while he was still at the gun. Ultimately, the available evidence did not permit the Tribunal to come to a view about the period of time between Sheean's decision to return to the gun and his death, other than that it was possibly longer than three to four minutes. The Applicant submitted, and the Tribunal agrees, that the time that Sheean was at the gun was immaterial - it was the selfless turning back to the gun that was relevant.

118. The Applicant, in referring to the criteria for the VC, noted the Respondent's conclusion in the Defence Report that there was 'no doubt that Sheean's actions demonstrated gallantry under all of the guises of bravery, courage, heroism, valour and daring and that it was conspicuous to those that were there'.

119. The Applicant also referred to survivors in their statements describing Sheean's actions in terms ranging from 'heroic behaviour, 'awe inspiring', 'altruism', 'very brave', 'something really exceptional', 'one of the bravest things that was done that could ever be recorded' to 'idiotic'. The Applicant asked the Respondent, rhetorically, if those words (presumably excluding the characterisation of Sheean's actions as 'idiotic') did not amount to

[111] *Hanuszewicz and the Department of Defence re: Cameron* [2019] DHAAT 08 (23 May 2019), p. 28, para. 111.
[112] The Defence Report, p. 14, para. 50(i).

'most', what then might 'most' mean? As to whether Sheean's actions could be deemed to meet the criteria for the award of the VC, Admiral Noonan said he was not at liberty to assist the Tribunal. When asked by the Tribunal about what more Sheean could have done to earn the VC, in terms of the 'most conspicuous gallantry' criterion Admiral Noonan, again, said he was unable to assist the Tribunal. However, in his evidence Admiral Noonan said:

> *Sheean's actions on that day, 1 December 1942, were absolutely amongst the most conspicuous and most gallant we've seen in our Navy.*[113]

120. Admiral Noonan submitted that 'most' is a comparative term that needs to be analysed in the context of when the actions took place.

121. In its consideration of the concept of 'most', the Tribunal postulated whether the context of the Regulation required the actions for each successive award of a VC to be superior, that is, *more* conspicuous than the last VC awarded. However, the Tribunal rejected this possible interpretation as being inconsistent with the language of the Letters Patent as a whole.[114]

122. Consequently, the Tribunal attached significant weight to Admiral Noonan's statement that Sheean's actions were 'amongst the most conspicuous and most gallant we've seen in our Navy'. Such characterisation was consistent with the Tribunal's view that the actions in question did not need to be more conspicuous than those which previously have given rise to the award of a VC, but are to be assessed on their own merits.

123. The Tribunal considered that there was clear evidence that Sheean left the potential safety of the motor-boat to go back to an exposed position at the Oerlikon gun. What is unclear is why he did so, given that, as the Tribunal has found, he is unlikely to have been wounded before he turned back. Admiral Noonan conceded that, in returning to the gun, Sheean had decided to forego his opportunity at survival by abandoning ship.[115] Clearly, Sheean's best prospects for survival were if he were to get in the motor-boat, but he chose not to, in direct contravention of the order to abandon ship. There was no evidence that there was insufficient room for him in the motor-boat, nor any suggestion that this was a reason for his return to the Oerlikon gun.

124. Instead, the Tribunal was reasonably satisfied that there was evidence that those in the water were being fired upon by enemy aircraft and Sheean recognised that he could help his shipmates and potentially stop them from being fired upon by 'having a go' [at the enemy aircraft]'[116]. As a result, one plane was shot down and possibly one or two others were damaged. While it is unclear if he specifically intended to draw fire away from those in the

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[113] Oral Evidence by Admiral Noonan, Hobart, 25 March 2019.
[114] In *Project Blue Sky* at [69]: The meaning of the provision must be determined by reference to the language of the instrument viewed as a whole.
[115] Oral Evidence by Admiral Noonan, Hobart, 25 March 2019.
[116] Transcript of Interview Walker/Lansbury/Pellet/McKellar.

water, the Tribunal was reasonably satisfied that Sheean turned back in the interests of the ship's company; there was no personal benefit to him in returning to the Oerlikon gun.

125. The Tribunal therefore finds that Sheean's action in turning back to the Oerlikon gun, in circumstances where he had forgone his opportunity for survival by not abandoning ship and instead returning to the gun to engage enemy aircraft constituted an act of the most conspicuous gallantry.

126. **Did Sheean perform a daring or pre-eminent act of valour or self-sacrifice?** Admiral Noonan was asked by the Tribunal about his understanding of the term 'pre-eminent act of valour or self-sacrifice'. He said that he would categorise 'pre-eminent' as meaning 'of the highest order', above which there is none higher.[117] He thought it was reasonable to characterise Sheean's actions as 'extremely honourable', but stopped short of describing Sheean's actions as 'pre-eminent'. Admiral Noonan went on to say however, that in the highly unlikely event that, in 2019, enemy aircraft were able to defeat the air defences of a modern day destroyer, and if the only thing that was left was a sailor with a .50 calibre machine gun, who continued firing as the ship sank; he considered that in that context, he would regard such action as 'pre-eminent'.

127. The Tribunal in *re Cameron* considered that to be 'pre-eminent', the act should surpass other 'comparable' acts of valour. The Tribunal in this matter considered that it was therefore appropriate to examine other comparable acts of valour. Also, and for the reasons discussed previously, the Tribunal considered that it was not necessary for the 'pre-eminent' act to be superior to the last VC awarded.

128. For the purposes of comparison, the Applicant raised with the Tribunal two cases in which Imperial VCs were awarded posthumously and for actions ostensibly similar to Sheean's. While each case is different and must be assessed on its merits, the cases of Leading Seaman Jack Mantle of HMS *Foylebank* and Petty Officer Alfred Sephton of HMS *Coventry* are strikingly similar to that of Sheean. While the Respondent also referred to those matters, it did so in the context of comparing the process by which awards were made and not the merits of the individual actions.

129. Leading Seaman Mantle's citation reads:

> *Leading Seaman Jack Mantle was in charge of the starboard pom-pom gun when HMS Foylebank was attacked by enemy aircraft on the 4th of July 1940. Early in the action his left leg was shattered by a bomb, but he stood fast at his gun and went on firing with hand-gear only: for the ship's electric power had failed. Almost at once he was wounded again in many places. Between his bursts of fire he had time to reflect on the grievous injuries of which he was soon to die but his great courage bore him up till the end of the fight, when he fell by the gun he had so valiantly served.* [118]

[117] Oral Evidence by Admiral Noonan, Hobart, 25 March 2019.
[118] Citation for the Victoria Cross – The Late Acting Leading Seaman J.F. Mantle, 3 September 1940.

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130. The Respondent submitted that the Tribunal did not have the benefit of a full understanding of that particular action, what the circumstances were in terms of the unit's posture, disposition, the damage to the ship, the status of the command arrangements at the time, where Mantle was wounded, how badly he was wounded, or how many times he was wounded. For this reason also, Admiral Noonan said he was unable to comment on the purported 'pre-eminence' of Mantle's actions.

131. The Tribunal acknowledges that it did not have the full details of Mantle's actions available to it. However it observed that on the available information, there were a number of differences between Mantle's actions and those of Sheean. Firstly, Mantle was severely injured while at his post, and presumably had limited capacity to move to safety, or to abandon ship, if that had been ordered. However, the Tribunal has found, Sheean was not wounded until after he had made a decision to leave the motor-boat stowage position to return to the Oerlikon gun.

132. Additionally, Mantle remained at his action station and continued firing; whereas Sheean turned back from the motor-boat to take up a position at the Oerlikon gun and take the gunner's role. While Mantle's post was as the Officer-in-Charge of the gun, Sheean was a loader on the Oerlikon gun. While the Tribunal has found Sheean was likely to have been capable of firing the gun, he did not simply maintain his post, as Mantle had done. The Tribunal considered that Sheean's actions appear to compare favourably with those of Mantle; and in fact, on the available evidence, he may have surpassed Mantle's valour.

133. Petty Officer Sephton's citation reads:

> *Petty Officer Sephton was Director Layer when HMS Coventry was attacked by aircraft, whose fire grievously wounded him. In great pain and faint from loss of blood, he stood fast doing his duty without fault until the enemy was driven off. Thereafter until his death his valiant and cheerful spirit gave heart to the wounded. His high example inspired his shipmates and will live in their memory.* [119]

134. On the limited available information, it would again appear that Sheean's actions, compare most favourably with those attributed to Sephton. Sephton was grievously wounded but remained at his post, whereas Sheean returned to the Oerlikon gun to take up the firing position.

135. An important and distinguishing feature of both these cases is that Mantle and Sephton appear to have been wounded at their respective posts but continued firing their weapons. Sheean, on the other hand, exercised a choice to return to the Oerlikon gun and take up a position that was not his own. The Tribunal considered, on the available evidence, that Sheean's actions appear in fact to exceed those of Mantle and Sephton. The Tribunal therefore finds that Sheean's actions surpass comparable acts which resulted in the award of the Imperial VC.

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[119] The London Gazette No. 35363, p.6889 dated 28 November 1941.

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136. While it is unclear why Sheean turned back to the Oerlikon gun, the Tribunal considered it would have been evident to him that he was forgoing his chance at survival. Whether it was his intention specifically to distract the enemy aircraft is unknown. It is a fact that he fired upon the enemy aircraft, and was credited with bringing down one of those aircraft. The Tribunal accepted that Sheean was in circumstances of extreme peril – the ship was lost. He knew the ship had been torpedoed, was listing and the order had been given to abandon ship but contrary to those orders, he did not abandon ship. He had available to him the option of taking to the motor-boat, but chose not to do so. His decision to leave the motor-boat stowage position was a conscious acceptance of danger in the interest of others - he then strapped himself into the gun of the sinking ship.

137. By taking up a firing position at the Oerlikon gun, Sheean went above and beyond his duty – he assumed a role that was not his. The evidence is unclear as to whether his actions were spontaneous or pre-meditated, but, in the circumstances, there could have been no possible positive outcome for him personally. The only logical conclusion was that he took the action that he did to prevent or at least minimise the effects of the enemy strafing - a conclusion that was supported by the Respondent.

138. Given that Sheean was an 18 year-old ordinary seaman with only 19 months in the Navy, the Tribunal asked Admiral Noonan if the age, experience or seniority of a sailor, were relevant in determining if a gallant action could be described as 'most conspicuous' or 'pre-eminent'. Admiral Noonan said that at age 18, sailors are extremely enthusiastic and a young person is more likely to do the sort of things that Sheean did than an older person in a very desperate situation such as that of *Armidale*. From his experience with contemporary awards, he observed that no recipient of a gallantry honour planned to find themselves in the situation that they did. Consequently, he said that he was unsurprised that in 1942, an inexperienced 18 year-old would have acted as he did, as would a current sailor, and 'do all that he could with the means that [he had] available to save their ship or protect their shipmates'.

139. In his oral submissions Admiral Noonan referred to Sheean's devotion to duty and self-sacrifice. There is no doubt, he said, that 18-year-old Sheean, with less than six months operational experience in *Armidale*, served with honour, honesty, courage, integrity and loyalty – values and behaviours that were just as important then as they are in today's Navy. Sheean's heroism, he said, has become the standard to which the men and women of the modern Navy aspire.

140. Admiral Noonan also submitted that of the 149 personnel in *Armidale*, only 49 survived and it therefore could be said that 100 people 'sacrificed their lives that day'. While the Tribunal agrees that the lives of 100 servicemen were indeed 'sacrificed', unlike Sheean, this loss did not entail acts by those members to give up their lives; they were victims of the enemy attack that caused the ship's loss.

141. Sheean was, in the Tribunal's view, going far beyond what was expected of a sailor placed in similar circumstances. The Respondent's evidence was of an expectation that when

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the order to 'abandon ship' was given, the ship's company would immediately do as ordered. In disobeying that order Sheean elected to forgo his own opportunity for survival for the benefit of his shipmates.

142. Having considered the evidence, and having found that Sheean's actions surpassed comparable acts which resulted in the award of the Imperial VC, the Tribunal was reasonably satisfied that Ordinary Seaman Sheean's actions should be considered to be a pre-eminent act of valour.

143. The Tribunal therefore finds that Sheean's action in turning back to the gun, in circumstances where he had forgone his opportunity for survival and firing upon the enemy aircraft who were strafing the survivors, until he was no longer able to do so, constituted a pre-eminent act of valour.

Conclusion in relation to the Victoria Cross for Australia.

144. The Tribunal is satisfied that Ordinary Seaman Sheean, in the presence of the enemy, performed an act of the most conspicuous gallantry and that his actions are also properly considered to be a pre-eminent act of valour.

145. For the reasons given above, the Tribunal finds that Ordinary Seaman Edward Sheean meets the eligibility criteria for the Victoria Cross for Australia.

TRIBUNAL DECISION

146. The Tribunal decided to **recommend** to the Minister for Defence Personnel that:

a. The decision by the Chief of Navy to refuse to recommend the award of the Victoria Cross for Australia to Ordinary Seaman Edward Sheean in respect of his actions in HMAS *Armidale* during a Japanese aerial attack in the Timor Sea on 1 December 1942 be **set aside**.

b. The Minister **recommend** to the Sovereign that Ordinary Seaman Edward Sheean be posthumously awarded the Victoria Cross for Australia for the most conspicuous gallantry and a pre-eminent act of valour in the presence of the enemy in HMAS *Armidale* during a Japanese aerial attack in the Timor Sea on 1 December 1942.

Draft Citation for the Victoria Cross for Australia

147. The Tribunal considered a suitable citation for Sheean's VC to be as follows:

For the most conspicuous gallantry and a pre-eminent act of valour in the presence of the enemy in HMAS *Armidale* during a Japanese aerial attack in the Timor Sea on 1 December 1942.

On 1 December 1942, during operations in the Timor Sea, HMAS *Armidale* came under aerial bombardment and torpedo attack from Japanese aircraft. Shortly after the commencement of the attack, *Armidale* was hit by a torpedo and began listing to port. One minute later the ship was hit by a second torpedo which broke the vessel's back, causing the Captain to order abandon ship.

Ordinary Seaman Sheean made his way to the stowage position of the motor-boat and assisted in its launch. As the enemy continued to fire upon the ship and his shipmates who were already in the water, Ordinary Seaman Sheean decided to forgo his opportunity for survival by not abandoning ship and returning to his action station to man the aft Oerlikon gun. Despite being wounded, he strapped himself into the gun and commenced firing at the enemy shooting down at least one aircraft.

Ordinary Seaman Sheean's actions disrupted and distracted the enemy aircraft from strafing and killing his defenceless shipmates in the water. He sacrificed his life trying to save his shipmates and despite his wounds, he continued firing the gun until the ship sank and took him to his death. His pre-eminent act of valour and most conspicuous gallantry saved lives. His heroism became the standard to which the men and women of the modern Navy aspire.

De-classified

CHIEF OF THE DEFENCE FORCE

EC19-005424

The Hon Darren Chester MP
Minister for Veterans and Defence Personnel
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Minister,

I am writing in response to your request for comment on a Defence Honours and Awards Appeals Tribunal (the Tribunal) recommendation to award the Victoria Cross for Australia (VC) to Ordinary Seaman Edward Sheean. I note my office has already provided email advice on my behalf in response to your request. However, as this earlier advice paraphrased my views, I am following up with this more detailed written response.

The Tribunal recommendation currently under consideration pertains to actions undertaken by Ordinary Seaman Sheean on 1 December 1942, specifically calling for the retrospective awarding of a posthumous VC in lieu of the posthumous Mention in Despatches Ordinary Seaman Sheean was originally awarded. I am further advised that on 23 July 2019, the Tribunal recommended that a 2018 determination by the Chief of Navy not to progress the retrospective award be set aside, and that you progress the recommendation for Ordinary Seaman Sheean to be posthumously awarded the VC.

I strongly advise against acceding to the Tribunal's 23 July 2019 recommendation. Ordinary Seaman Sheean's case was comprehensively reviewed under the 2011 – 2013 Valour Inquiry. This inquiry recommended no action be taken by the Government to award the VC, or any other form of medallic recognition for gallantry or valour, to any of the 13 individuals named in the Terms of Reference, including Ordinary Seaman Sheean. Going back as far as Ordinary Seaman Sheean's Second World War actions, and since the Valour Inquiry was finalised in 2013, no new evidence has been introduced to support the Tribunal's 23 July 2019 recommendation. Accordingly, I submit that the Tribunal's latest recommendation can only be based on a different interpretation of evidence that was the subject of the original command decision and previous detailed review. In this regard, I do not see the circumstances surrounding the appeal for Ordinary Seaman Sheean as being sufficient to overturn the original decision, or distinct from a large number of other potentially worthy claimants.

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I also wish to emphasise that as this particular case calls for the awarding of a VC, progressing this matter for approval would ultimately see the recommendation put before Her Majesty the Queen for decision. Consideration of this decision, like all VC considerations, is a matter Her Majesty is known to be personally interested in as the VC is the premier award for valour in the Commonwealth with direct ties to an award instigated by her Great Great Grandmother. Defence Honours and Awards staff have advised me that a decision in favour of Ordinary Seaman Sheean would be unprecedented for both Australia and the broader Commonwealth. As such, I ask that you give careful consideration as to the reasonableness of a Minister of the Crown placing Her Majesty in such a position. Doing so may well damage Australia's standing among other Commonwealth countries, and potentially with the Queen herself.

Lastly, given the paramount status of the VC as our highest military award for valour, I have serious concerns for the integrity of Defence's broader honours and awards system should this recommendation progress any further. Such an outcome would almost certainly set a precedent that would disproportionately encourage a swathe of additional claims for retrospective military honours and awards at all levels and from all past conflicts. With this particular point in mind, I strongly recommend that the complexities of this matter be used as a basis for action to constrain the remit of all avenues for honours and awards determinations, with a view to removing any potential for future Government consideration of the retrospective awarding of VCs.

I trust my comments will be useful in informing your consideration of this important matter. I am, of course, available to discuss directly should you require any further information or clarification of the views I have offered.

Yours sincerely

s22

Angus J Campbell, AO, DSC
General
Chief of the Defence Force

4 October 2019

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PO Box 7900
CANBERRA BC ACT 2610

De-classified

De-classified

PRIME MINISTER

Reference: MC19-066867

4 DEC 2019

The Hon Darren Chester MP
Minister for Veterans and Defence Personnel
Parliament House
CANBERRA ACT 2600

Dear Minister

Thank you for your letter dated 30 September 2019 regarding a review of the Defence Honours and Awards Appeals Tribunal: *Barnett and the Department of Defence re: Sheean* [2019] DHAAT 09 (the 2019 review). I do not agree with your proposed response.

This matter was adequately reviewed by the Defence Honours and Awards Appeals Tribunal in its 2011-13 *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry), which recommended that "no action be taken to award Ordinary Seaman Sheean a VC or other further form of recognition for his gallantry or valour". The Government accepted the recommendations of the Valour Inquiry in 2013.

Clear Government policy, informed by Her Majesty The Queen's expressed views, would only allow the award of the *Victoria Cross* in the light of compelling new evidence or in a case of manifest injustice.

The 2019 review by the Tribunal does not present any compelling new evidence that might support reconsideration of the decision, made by the competent authorities at the time, to recognise the gallant actions of Ordinary Seaman Sheean on the HMAS Armidale on 1 December 1942 with the award of *Mention in Despatches*.

Implementation of the 2019 review's recommendations would inevitably result in requests for further reconsideration of the Tribunal's previous inquiries and reviews, and such an outcome would not be in keeping with the aim of the Tribunal being the final arbiter of Defence honours and awards matters.

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De-classified

De-classified

I ask that you write to the Chair of the Tribunal advising the Government response and requesting that the Tribunal advise the parties of the outcome.

This letter has been copied to the Minister for Defence, Senator the Hon Linda Reynolds CSC.

Yours sincerely

s22

SCOTT MORRISON

De-classified


s22

The Hon Darren Chester MP
Minister for Veterans and Defence Personnel

M819-001099

The Hon Scott Morrison MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

On 23 July 2019, the Defence Honours and Awards Appeals Tribunal (the Tribunal) submitted its report and findings to me in the review of Barnett and the Department of Defence regarding Ordinary Seaman Edward Sheean to be awarded the Victoria Cross.

The Tribunal recommended that I set aside the decision by the Chief of Navy not to award the Victoria Cross and that I recommend to the Sovereign that Ordinary Seaman Sheean be posthumously awarded the Victoria Cross for Australia. I agree with the Tribunal's recommendations and therefore seek your support to recommend the award to the Sovereign.

A Victoria Cross is awarded *for the most conspicuous gallantory, or a daring, or pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.* The Tribunal found that Ordinary Seaman Sheean's decisions and acts demonstrated a special and additional element of courage, beyond what was expected of him.

Background
On 01 December 1942, HMAS Armidale came under attack from a number of Japanese bombers and fighters. The ship was struck by two torpedoes and possibly one bomb and sunk quickly. During the action, one bomber and one fighter crashed, the bomber was brought down by the aft Oerlikon manned by Ordinary Seaman Sheean, who remained at the gun until the ship sunk. Ordinary Seaman Sheean was awarded the Posthumous Mention in Dispatches for his gallantry.

For a number of years Ordinary Seaman Sheean's family and others, including the Hon Guy Barnett have advocated for a Victoria Cross to be awarded for his actions during the sinking of HMAS Armidale. In 2013, Mr Barnett sought that Ordinary Seaman Sheean's case be included in the Valour Inquiry (Inquiry into the Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour). The Valour Inquiry recommended that no action be taken to award Sheean a Victoria Cross or any other form of recognition. Mr Barnett subsequently approached the Chief of Navy in August 2017 who informed that Ordinary Seaman Sheean's recognition had already been considered and that as there was no new evidence, recognition would not be reconsidered. Mr Barnett applied to the Tribunal seeking a review of the Chief of Navy's decision in October 2018 which was accepted.

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Summary of Tribunal Report

At the Tribunal hearing, evidence was provided by a number of individuals including the Chief of Navy, Admiral Michael Noonan and Commander Paul Fothergill who undertook research for the Defence report. Evidence was supplied by reports of the day, historians as well as written testimonies from members who served alongside Ordinary Seaman Sheean on HMAS Armidale (only one surviving member).

On that fateful day while under attack, an order was given to abandon ship. Evidence suggests that Ordinary Seaman Sheean made his way to abandon, however instead returned to the Oerlikon where his position was actually a loader not a gunner, strapped himself in and began firing, shooting down one and possibly damaging another aircraft. Ordinary Seaman Sheean was likely already wounded when he strapped himself into the gun and soon after, he went down with the ship.

There is documented evidence from the Commanding Officer and a shipmate that Ordinary Seaman Sheean was responsible for bringing down an enemy bomber. Weight was placed on a shipmate's evidence which was published in 1945 and confirmed by the only surviving shipmate which is consistent with recorded evidence. The Tribunal concluded that the Report of Proceedings completed by the Commanding Officer, understated Ordinary Seaman Sheean actions that day.

Defence's Position

The Chief of the Defence Force has directed Defence, and has maintained the view, that no retrospective honours and awards are considered unless there has been maladministration or there is compelling new evidence not available at the time. This is to maintain the integrity of the Australian honours and awards system. The Valour Inquiry relied on this direction which resulted in its finding that no honours are to be awarded. Defence also note that the decision to award was based on the evidence and assessment of the day and we should respect original decisions where process has been followed.

Considerations

Reservations have been expressed regarding the potential precedent this award may set for other retrospective requests, however I do not anticipate this and trust that the Tribunal will appropriately manage any influx and only review what is necessary under its guidelines. It is important to note that the Tribunal has received many inquiries for awarding a Victoria Cross, but this is the first recommendation since its establishment as a statutory body in 2011 that the Tribunal is supportive following its review. Whatever the decision, it is anticipated that there will be significant media commentary.

The Tribunal's report is enclosed should you require further information on this review. Should you support my recommendation, our office will engage with British High Commission to facilitate the request to the Sovereign to award the Victoria Cross. A copy of this letter has been provided to the Minister for Defence, the Hon Linda Reynolds.

Yours sincerely

s22 [redacted]

DARREN CHESTER 30 SEP 2019

COPY
FOI 004/19/20 Doc 7

PREMIER OF TASMANIA

23 MAR 2020

The Hon Scott Morrison MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister Scott

I write seeking an update on the Defence Honours and Awards Appeals Tribunal's (the Tribunal) review into posthumous recognition of Ordinary Seaman Edward 'Teddy' Sheean, of Latrobe Tasmania.

As you would be aware, Sheean is one of Tasmania's best known servicemen. His actions onboard *HMAS Armidale* during the Second World War are considered by the Tasmanian Government, RSL Tasmania, the Sheean family and many others to be deserving of a Victoria Cross.

Sheean went down with his ship, HMAS ARMIDALE, on 1 December 1942 after a Japanese air attack.

Rather than abandon ship, he chose to proceed to an Oerlikon gun (not his normal position), strap himself into the firing position and engage with enemy aircraft, which were strafing his crewmates in the water.

Sheean shot down at least one plane and disabled another before his ship sunk beneath him. He was just 18 years of age when he died.

The Tribunal on 26 and 27 March 2019 in Hobart, in its merits review, was asked to determine whether Sheean's actions met the pre-eminent standard required for the posthumous award of a Victoria Cross for Australia (as opposed to a VC from the UK).

I am aware that the applicant, the Hon Guy Barnett MP, Minister for Veterans' Affairs, the Sheean family and Teddy's last remaining shipmate from the HMAS Armidale, Ray Leonard, have made approaches to the Federal Government seeking an update on the Government's consideration. No definitive response has been provided.

The Tribunal is independent, expert and highly credible. An extensive body of work was undertaken in making a recommendation. It is the Tasmanian Government's view that it would be unconscionable for the Federal Government to reject the findings and recommendations of such a distinguished Tribunal, noting in the past the Federal Government specifically welcomed the Tribunal hearing into this matter. Further any suggestion that the granting of a VC could 'open the floodgates'

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or is unprecedented is not true based on the facts. In short, the Tribunal undertook a 'merit-based' review and its decision should stand.

The Sheean family and people across Tasmania and indeed Australia are waiting to hear the outcome of the Federal Government's consideration.

Teddy was an ordinary Australian who demonstrated extraordinary bravery. He deserves the best we can give him.

I encourage your positive consideration of this matter and look forward to your response.

Yours sincerely

s22 [redacted]

Peter Gutwein MP
Premier
Treasurer

PRIME MINISTER

Reference: MC20-043474

12 MAY 2020

The Hon Peter Gutwein MP
Premier of Tasmania
GPO Box 123
HOBART TAS 7001

Dear Premier

Thank you for your letter dated 23 March 2020 regarding a review of the Defence Honours and Awards Appeals Tribunal: *Barnett and the Department of Defence re: Sheean* [2019] DHAAT 09 (the 2019 review). I apologise for the delay in responding to you.

This matter was adequately reviewed by the Defence Honours and Awards Appeals Tribunal in its 2011-13 *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry), which recommended that "no action be taken to award Ordinary Seaman Sheean a VC or other further form of recognition for his gallantry or valour". The Government accepted the recommendations of the Valour Inquiry in 2013.

Clear Government policy, informed by Her Majesty The Queen's expressed views, would only allow the award of the *Victoria Cross* in the light of compelling new evidence or in a case of manifest injustice.

The 2019 review by the Tribunal did not present any compelling new evidence that might support reconsideration of the decision, made by the competent authorities at the time, to recognise the gallant actions of Ordinary Seaman Sheean on the HMAS Armidale on 1 December 1942 with the award of *Mention in Despatches*.

I understand this may be a disappointing outcome, but it in no way detracts from the service, dedication and sacrifice of Ordinary Seaman Edward 'Teddy' Sheean.

Copies of this letter have been provided to the Minister for Defence, Senator the Hon Linda Reynolds CSC, and the Minister for Veterans' Affairs and Minister for Defence Personnel, the Hon Darren Chester MP.

Yours sincerely

s22 [redacted]

SCOTT MORRISON

Parliament House CANBERRA ACT 2600
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www.pm.gov.au

Australian Government

Defence Honours and Awards Appeals Tribunal

DHAAT/OUT/2020/157

Senator the Hon. Linda Reynolds CSC
Minister for Defence
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

Dear Minister

I am writing to you to express my concern regarding the statement you made in the Senate on Wednesday 13 May 2020, concerning the Defence Honours and Awards Appeals Tribunal (the Tribunal) review of recognition for Ordinary Seaman Edward (Teddy) Sheean.

At the outset I wish to state that as the Chair of a quasi-judicial Tribunal for the last five years I have never found the need to make any public statement on the Government's consideration of the Tribunal's recommendations. Further, I accept that the Government may reject a recommendation made by the Tribunal for any reason.

My concern is that in making the announcement of your decision you have misrepresented the statutory function of the Tribunal, particularly in respect of its 2019 review into the Sheean matter, and misstated the standing of a purportedly clear government policy that a retrospective award of the Victoria Cross for Australia will only be allowed in the case of compelling new evidence or manifest injustice. These two statements, in my view, make your answer to the Senate misleading and in need of correction.

Your answer correctly stated that following its 2013 *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry) the Tribunal recommended that no action be taken to award Ordinary Seaman Sheean the Victoria Cross for Australia. I am not going to criticise that Tribunal for its recommendation or the then Government's acceptance of that recommendation. It is however, important to note that the Valour Inquiry was undertaken within the framework of a Terms of Reference set by a previous Government. Those Terms of Reference led the Tribunal to develop a set of guidelines for dealing with retrospective cases identified through that inquiry, which it followed in its assessment of Sheean. Foremost in those guidelines was that if due process had been followed, and there was no maladministration or compelling new evidence, then the original decision should remain unchanged.

While in Sheean's case it found both elements of maladministration and new evidence it concluded that on balance, they did not meet its requirements. The Tribunal went on to consider the merits of the case, again, within the parameters of the Terms of Reference, and concluded that Sheean's actions did not meet the requirements for the Victoria Cross for Australia. It did not elaborate on the processes leading to this conclusion, nor did it document its assessment of Sheean's actions against the eligibility criteria. It also observed

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that had Sheean lived, he might have been recommended for a higher Imperial honour, but noting that such awards were not available posthumously, it stated that 'equivalent' Australian gallantry awards, which are available posthumously, should not be recommended now. It did not state that there is no legal impediment to such awards being made retrospectively, and you should be aware that there is considerable precedent for Australian gallantry awards being made retrospectively, both as a result of recommendations initiated by the Tribunal and by Defence.

Turning to the Tribunal's recent review, in 2018, the applicant, Minister Barnett, wrote to the then Chief of Navy seeking that Sheean's bravery be reconsidered for more appropriate recognition, in particular, the Victoria Cross for Australia 'or other such award as appropriate'. This application was refused by the current Chief of Navy, Vice Admiral Michael Noonan AO RAN. In doing so, Vice Admiral Noonan relied on the Valour Inquiry's findings and principles.

Section 110VB(1) of the *Defence Act 1903* provides an individual with a right to appeal a decision of Defence where that decision is a refusal to recommend a person for a defence honour, including the Victoria Cross for Australia.

The application lodged by Minister Barnett to the Tribunal under the above provision did not seek a review of the Valour Inquiry but a review of the decision of the Chief of Navy. In doing so, Minister Barnett sought a full, merits based review of Sheean's actions against the eligibility criteria for the honour sought.

The Act sets out the functions of the Tribunal in completing such a review. In short, it requires the Tribunal to conduct an independent merits review of the facts against the eligibility criteria for the honour sought. The review is not constrained by terms of reference, and is conducted within the scope of the Tribunal's Procedural Rules. The recommendation to Government was the outcome of that review and I am satisfied the review was completed in accordance with the law.

Both Minister Barnett and Defence representatives made written and oral submissions. Over two days of public hearings which elicited considerable public interest, I clearly explained on numerous occasions both the nature of the review process and that it was not a review of the Valour Inquiry or its findings. The applicant, the respondent and others present clearly understood the nature of the review. The applicant presented evidence, including new evidence, around the facts of the action and the eligibility criteria for the Victoria Cross for Australia.

Vice Admiral Noonan was very open in his evidence going to the nature of Sheean's actions and gallantry. The Tribunal received no complaint about the process of the review.

The recommendation of the Tribunal is not a particularly long document, however it may be useful to record a short summary of the facts identified by the Tribunal concerning Sheean, and how they compared with the facts available to the Admiralty in 1943.

- Sheean did not remain at his post throughout the engagement, as indicated in the report to the Admiralty. After being ordered to abandon ship, he moved to the relative safety of a lifeboat and helped another sailor, Able Seaman Pellet, release the lifeboat. Sheean observed that the Japanese were strafing both the ship and

those in the water. He told Pellet that he had to do something about it and returned to the gun. Pellet survived.

- Sheean was not wounded until after he had decided to return to the gun.
- Sheean was a gun loader, not a gunner. However, when he arrived at the gun he took up the gunner's position and fired at the enemy aircraft. He shot down one aircraft and possibly a second. It was a short engagement, as his ammunition would have been exhausted, and it is unlikely he could have reloaded the gun.
- Sheean died at his gun. We do not know whether it was from his wounds or by drowning.
- Sheean's name was spelt incorrectly in the advice to the Admiralty.

These facts were accepted by all parties at the Tribunal hearing. They are dealt with more fully in the Tribunal's recommendation. The facts as determined are manifestly different to those presented to the British Admiralty and advanced on those considered in the Valour Inquiry.

Having established those facts, the Tribunal moved to an assessment of Sheean's actions against the eligibility criteria for the Victoria Cross for Australia, established by Letters Patent on 15 January 1991. It is Australia's highest gallantry decoration for the purpose of:

> *according recognition to persons who, in the presence of the enemy, perform acts of the most conspicuous gallantry, or daring or pre-eminent acts of valour or self-sacrifice or display extreme devotion to duty.*

The Tribunal considered the actions of Sheean against each of these criteria and found that he met each of the three criteria. Again the recommendation addresses this in more detail.

Having determined that Sheean fulfilled the criteria for the Victoria Cross for Australia, the Tribunal did not examine whether he also met the criteria for other honours, however it follows that Sheean's actions met the criteria for the Star of Gallantry, and other Australian Gallantry Decorations.

The review was completed, and the recommendations had the unanimous support of all Tribunal members involved. It was presented to the Minister for Defence Personnel in July 2019. Shortly after, the Minister advised me that he was comfortable with the recommendations and that he would be communicating with senior Ministers including yourself and the Prime Minister. Until your announcement on Wednesday I have not been informed of the process or progress of the consideration of the recommendations. I am at this stage assuming you are the decision maker and that the Tribunal will be properly informed of your decision in due course.

In your statement you advised the Senate that the Tribunal conducted a review of the Valour Inquiry's recommendations in relation to Sheean. This is false. There is no process available to review that inquiry. The Tribunal conducted a review of the decision of the Chief of Navy and its report does not review what occurred in the Valour Inquiry nor seek to overturn its

recommendations. Any reading of the Tribunal's recommendation would confirm this critical point.

While the Tribunal's review was not obliged to find new evidence or evidence of injustice in the course of its review, the reader would also note that new evidence was presented, and that the Tribunal found that the evidence provided to the British Admiralty in 1943 was inaccurate and that it understated Sheean's actions. On the basis of this inaccurate evidence, the British Admiralty recommended that he be posthumously awarded the Mention in Despatches, and not the other posthumous honour that was available at the time, the Victoria Cross.

You also stated that there is clear government policy, informed by Her Majesty The Queen's expressed views, that would only allow the award of the Victoria Cross in light of compelling new evidence or in the case of manifest injustice. The Act, in outlining how a decision must be reviewed, contains no such prescription. The Letters Patent for the Victoria Cross for Australia signed by Her Majesty the Queen include no such prescription. While the British government has its own policy regarding retrospective honours and awards, to my knowledge, The Queen of Australia has expressed no corresponding view concerning the Australian honours system.

This policy is also not articulated in the Defence Manual on Honours and Awards. Even if it was, as an administrative policy document, the manual is subordinate to the Act. Based on the advice that you receive from Defence, it is open to yourself as the Minister, and to the Prime Minister, to believe that such a policy principle is desirable, but it is not one that is consistent with the law.

The Tribunal was offered an insight into Defence policy on retrospectivity when the Chief of Navy, the decision maker in this matter made the following statement to the Tribunal, and subsequently released by Defence

> *"It is Navy's position, consistent with Defence policy, that the most appropriate decision-making body to retrospectively determine whether an individual's actions are deserving of an award for gallantry against the award criteria is the Defence Honours and Awards Tribunal. Navy has, and will continue to support the independent findings of the Tribunal"*

I do assume you have received advice on this matter before you made your statement. It would seem to be inadequate and inaccurate. I do believe a thorough reading of the Tribunal's decision and reasons would be useful.

Your statements make it difficult for the Tribunal to progress its current workload. There are several matters under consideration by the Tribunal including a review involving the Victoria Cross. I am advising the Tribunal responsible for that matter to proceed according to the law. I will need to consider what advice I will give any applicant or respondent if they ask the impact of the advice you gave the Senate.

I would be pleased to discuss the issues raised in this letter with you or with the Department of Defence. As this goes to the conduct of the Tribunal's review into Ordinary Seaman Sheean my intention is ensure that the applicant and the respondent are aware of my concerns. I should also convey my concerns to the Senator who asked the question to ensure she is aware of what the Tribunal did seek to do and what it did not do.

Yours sincerely

s22 [redacted]

Mark Sullivan AO
Chair
Defence Honours and Awards Appeals Tribunal
18 May 2020

Cc: The Hon. Darren Chester MP, Minister for Defence Personnel
The Hon. Guy Barnett, Minister for Veterans Affairs (Tas)
Mr Greg Moriarty, Secretary of the Department of Defence
Senator Jacqui Lambie, Senator for Tasmania

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR DEFENCE
SENATOR FOR WESTERN AUSTRALIA

MC20-001734

19 MAY 2020

Senator the Hon Scott Ryan
President of the Senate
Senator for Victoria
CANBERRA ACT 2600

Dear Mr President Scott

I have received a letter from Mr Mark Sullivan AO, the Chair of the Defence Honours and Awards Appeals Tribunal (the Tribunal). He has raised concerns about a statement I made to the Senate on 13 May 2020 regarding the decision of the Government that there was no compelling new evidence that might support reconsideration of the award of a Victoria Cross to Ordinary Seaman Edward 'Teddy' Sheean.

In my statement I said that the 2019 review by the Tribunal was a review of the 2013 Valour Inquiry's recommendation in relation to Ordinary Seaman Sheean. The 2019 review by the Tribunal was in fact into the 2018 decision of the Chief of Navy, which found that the Valour Inquiry had considered this matter and that there was no new evidence to support reconsideration or review of Ordinary Seaman Sheean's actions.

I note that the Chief of Navy considered the findings by the Valour Inquiry and the fact that the recommendations were accepted by Government and found there was no new evidence that supported reconsideration or review of the Valour Inquiry conclusion.

I would be grateful if you would correct the record accordingly.

Yours sincerely

s22 [redacted]

Linda Reynolds

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR DEFENCE
SENATOR FOR WESTERN AUSTRALIA

MC20-001734

19 MAY 2020

Mr Mark Sullivan AO
Chair
Defence Honours and Awards Appeals Tribunal
Locked Bag 7765
CANBERRA BC ACT 2610

Dear Mr Sullivan

I refer to your letter of 18 May 2020 regarding a statement I made to the Senate adding to the response to a question without notice from Senator Jacqui Lambie the previous day regarding Ordinary Seaman Edward 'Teddy' Sheean.

I reject your assertion that I misled the Senate in the course of making my statement. However, I referred to the review of the 2013 Valour Inquiry's recommendation instead of the 2018 decision of the Chief of Navy, which found that the Valour Inquiry had considered this matter and that there was no new evidence to support reconsideration or review of Ordinary Seaman Sheean. I have written to the President of the Senate requesting that the record be corrected.

This correspondence has been copied to the Minister for Defence Personnel and Minister for Veterans' Affairs, the Hon Darren Chester MP.

Yours sincerely

s22 [redacted]

Linda Reynolds

MINDEF statement to Senate 13.05.20

Ordinary Seaman Sheean

Mr President, I would like to answer a question I took on notice from Senator Lambie in Question Time yesterday regarding the matter of Ordinary Seaman Edward "Teddy" Sheean.

As outlined by Senator Lambie yesterday, Ordinary Seaman Sheean was killed in action on 1 December 1942 – actions that displayed conspicuous gallantry.

Sheehan was the subject of a contemporary nomination process which resulted in the posthumous award of *Mention in Despatches* for his actions in 1942.

This award was reviewed by the Defence Honours and Awards Appeals Tribunal in its 2011-13 Valour Inquiry, which recommended that "no action be taken to award Ordinary Seaman Sheean a Victoria Cross or other further form of recognition for his gallantry or valour".

The Government accepted the recommendations of the Valour Inquiry in 2013.

The Victoria Cross for Australia is Australia's highest decoration for gallantry, and is the only award in the Australian honours and awards system that is approved by the Sovereign.

Clear Government policy, informed by Her Majesty The Queen's expressed views, would only allow the award of the Victoria Cross in light of compelling new evidence or in a case of manifest injustice.

In 2019, the Tribunal conducted a review of the Valour Inquiry's recommendation in relation to the Sheean award, and subsequently reported to Government.

Having received confirmation last night, I am able to advise the Senate today that it is the Government's view that the 2019 review by the Tribunal did not present any compelling new evidence that might support reconsideration of the Valour Inquiry's recommendation.

This is also the view of Defence.

Mr President, I must emphasise that the outcome of the Government's decision in no way detracts from the service, bravery and sacrifice of Ordinary Seaman Sheean.

The Royal Australian Navy continues to commemorate the service of Teddy Sheean in a number of ways, including through the naming of a Collins class submarine, HMAS *Sheean*.

This is a rare form of commemoration in recognition of Teddy Sheean's exceptional service to our nation and ultimate sacrifice.

OMINDEF Advice

MC20-001734

BRAZIL, HILARY

Subject: LIMITED DISTRIBUTION: Advice on Correspondence from Mr Mark Sullivan, Defence Honours and Awards Tribunal

Question Asked / Reason for Department Providing this Advice:

OMINDEF is seeking urgent advice on the matters raised by Mr Mark Sullivan, Chair of the Defence Honours and Awards Tribunal, in the letter addressed to Minister Reynolds, about recognition for Ordinary Seaman Edward (Teddy) Sheean.

Response:

Mr Sullivan raised three main concerns in his letter. They are that the Minister for Defence erred in advising the Senate that the Tribunal conducted a review of the Valour Inquiry; that the Minister 'misrepresented the statutory function of the Tribunal'; and that the Minister 'misstated the standing of a purportedly clear government policy' regarding the circumstances in which a decision not to award a Victoria Cross will be revisited.

Mr Sullivan's advice that the Minister erred in her statement to the Senate on 13 May 20 when she stated that the Tribunal reviewed the outcome of the Valour Inquiry in 2019 is technically correct. The Tribunal reviewed the 2018 decision of the Chief of Navy.

However the Chief of Navy's decision was to uphold both the recommendations of the Valour Inquiry and the Australian Government's decision to accept those recommendations. In this respect, the Valour Inquiry featured significantly in the decision of the Chief of Navy. Mr Sullivan's concern that the Minister misrepresented the statutory function of the Tribunal seems to be a reference to the Minister stating that the Tribunal's review did not present any compelling new evidence. Mr Sullivan is concerned about any implication that the Tribunal should not conduct a full merits review of a case.

However the Minister does not state that the Tribunal must find new evidence in making its determination, she stated that the government followed its own policy in requiring

compelling new evidence or manifest injustice and having considered the Tribunal's review did not find any reason to reconsider the decision.

The Australian Government in its considerations of the recommendation is not obliged to accept the recommendations of the Tribunal.

Defence supports the Australian Government's decision to not accept the recommendation of the Tribunal to award Ordinary Seaman Sheean the Victoria Cross.

s47E(d)

Mr Sullivan's concern that the Minister misstated the standing of the government's policy is based on the fact that the policy is not articulated in the *Defence Act 1903* (the 'Act') and is allegedly inconsistent with the Act.

Government policy is that the thresholds of maladministration or compelling new evidence must be met before a retrospective award, or upgrade to an award, including a Victoria Cross be considered. These thresholds were established during the Valour Inquiry and adopted for administration of all Defence reviews for retrospective recognition. Defence regularly reiterates this position to the Tribunal in submissions for all other cases for retrospective honours.

This policy is not inconsistent with the Act, and instead provides guiding principles as to what the Government should look for when considering a retrospective award, or upgrade to an award. The Tribunal currently does not apply this policy. It does not have to. This does not prevent the government from adopting and applying the policy.

s47E(d)

In Ministerial Advice to the Minister for Veterans and Defence Personnel dated 14 April 20 (an information copy was provided to the Minister for Defence), Defence advised that the 2019 review of the Tribunal considered no new evidence. In his letter, Mr Sullivan states that the facts as determined by the 2019 review "advanced on those considered in the Valour Inquiry". The 2019 review conducted a full merits review and therefore put different weight on the evidence available. The Valour Review sought to consider whether there was

compelling new evidence that was not put to the original decision maker or manifest injustice.

How was the case referred to the Tribunal and what are the facts around this?

On 10 August 2017, Mr Guy Barnett wrote to the Chief of Navy seeking a review of the recognition for Ordinary Seaman Edward Sheean for his actions during the sinking of HMAS *Armidale* on 1 December 1942.

On 31 July 2018, the Chief of Navy advised Mr Barnett he had considered the findings of the 2011-2013 Valour Inquiry and the fact the recommendations of that Tribunal were accepted by the Government. The Chief of Navy said he also considered Mr Barnett's submission and was of the view that there is no new evidence that supports reconsideration or review of the Tribunal's conclusions.

On 30 October 2018, The Hon Guy Barnett MP applied to the Tribunal for a review of the Chief of Navy's decision to not review Ordinary Seaman Sheean's actions for further recognition. If an application is properly made to the Tribunal, pursuant to s 110VB(1) of the *Defence Act 1903*, the Tribunal has jurisdiction to review a 'reviewable decision'. That term is defined in s 110V(1) of the Act and includes a decision made by a person within the Defence Force to refuse to recommend a person for an honour in response to an application.

On 8 November 2018, Mr Mark Sullivan wrote to the Secretary of Defence, Mr Greg Moriarty requesting Defence provide a response. In accordance with the Tribunal's Procedural Rules, the report was to include the findings on material questions of fact and the reasons for its decision, and a reference to the evidence on which the findings were based.

How the tribunal in 2018 was reviewing in terms of the Act as compared to the Valour Inquiry?

The Defence Honours and Awards Appeals Tribunal has a review function (in Division 3) and an inquiry function (in Division 4) under part VIIC of the Defence Act 1903 (the "Act"). The Act allows the Tribunal to conduct a review on a reviewable decision; that is a refusal to recommend a person or a group of people for an honour or an award where the decision is made by or on behalf of the Minister, by the Department or by a person within the Defence Force, so long as it was made after 3 September 1939 or relates to service rendered after that date. This limb of the Tribunal is simply the review of decisions. This is the function that the Tribunal was performing in relation to the 2019 review.

Importantly the Act states that the Tribunal does not have the power to affirm or set aside decisions relating to a defence honour, they can only make recommendations to the Minister. 'Honours' are defined in the Defence Regulation 2016 and include the Victoria Cross. Therefore the decision does not lie with the Tribunal, and the Minister ultimately

decides whether to (in the case of a Victoria Cross) recommend the award of the honour, or refuse to recommend the award.

The inquiry function of the Tribunal, such as was used for the Valour Inquiry, is separate to the Tribunal's review function. The Minister may direct the Tribunal in writing to hold an inquiry into a specified matter concerning honours or awards for eligible service. The Tribunal must inquire into the matter and report to the Minister on the outcomes of their inquiry. For the Valour Inquiry, the Tribunal was directed to inquire into and make recommendations about the eligibility of certain specified members to be awarded the Victoria Cross, or other forms of appropriate recognition. In this sense, the Valour Inquiry may seem similar to a review, however the Minister may determine terms of reference and provide other guidance and direction for an inquiry, whereas the Minister may not do so for a review.

In either case, the Minister is not bound to follow any recommendations made by the Tribunal.

Decision making - Victoria Cross – role of the sovereign and role of the minister / prime minister

In her Letters Patent of 15 January 91, Her Majesty Queen Elizabeth the Second ordained that the award of the Victoria Cross was to be governed by the Victoria Cross Regulations. Those Regulations provide (at section 7) that:

> Awards of the decoration shall be made, with the approval of the Sovereign, by Instrument signed by the Governor-General on the recommendation of the Minister.

In this instance 'the Minister' is defined in these Regulations as 'the Minister of State for Defence', which encompasses all Ministers sworn to administer the Department of Defence. The convention for the award of the Victoria Cross is that only the Minister for Defence (not any of the other Ministers in the Portfolio) would make any such recommendation.

Further, the Department of the Prime Minister and Cabinet has advised that because the Victoria Cross is the only award in the Australian honours system that requires the approval of Her Majesty The Queen, any recommendation should go through the Prime Minister.

As such, they have advised that the Minister for Defence should seek the Prime Minister's agreement to convey a recommendation to The Queen.

Therefore in a practical sense, Defence would make a recommendation to the Minister for Defence, who would recommend to the Prime Minister, who would approach the Governor-General to seek the agreement of The Queen.

What is the law regarding Tribunal recommendations and government decisions?

Mr Sullivan's concern that the Minister misstated the standing of the Government's policy appears to be based on the fact that the policy is not articulated in the *Defence Act 1903* (the 'Act') and he is therefore of the view that it is inconsistent with the Act.

Government policy is that the thresholds of maladministration or compelling new evidence must be met before a retrospective award, or upgrade to an award, including a Victoria Cross be considered. These thresholds were established during the Valour Inquiry and adopted for administration of all Defence reviews for retrospective recognition. Defence regularly reiterates this position to the Tribunal in submissions for all other cases for retrospective honours.

Part VIIIC of the Act governs the way the Tribunal reviews a reviewable decision and how it is referred to the relevant decision maker for reconsideration if the Tribunal sets aside the original decision. In the case of a Defence honour such as the Victoria Cross, the Act stipulates that the Tribunal must review a properly made application and may make recommendations to the Minister. The Act does not stipulate what the Minister must do in respect of those recommendations. In the case of a Victoria Cross, the Minister must still refer to the original Letters Patent, and may refer to other relevant Government policy and considerations as they see fit.

The Government policy referred to in this instance is therefore not inconsistent with the Act, and instead provides guiding principles as to what the Government may look for when reconsidering a decision to issue a retrospective award, or upgrade to an award. This is separate to any policies that the Tribunal may apply which, as an independent statutory office, is not compelled to apply that same Government policy. This is sound from an administrative law perspective and indeed is consistent with the purpose of the review process.

New Evidence

Upon receipt of honour requests, Defence applies the definitions of maladministration and compelling new evidence to determine if a merits review will occur. These definitions were agreed by the then Parliamentary Secretary for Defence, Senator the Hon David Feeney as part of the Valour Inquiry.

Maladministration: a failure to follow established policy that may lead to disadvantage to the nominee. Conduct is deemed to be maladministration if it involves action or inaction of

a serious nature that is contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, or based wholly or partly on improper motives.

Compelling new evidence: reliable information that was not available to the commanders or decision makers of the day.

Based on the application of the above definitions, if the original decision-maker(s) made a decision to award an honour, or made a conscious decision not to make an award, Defence is being asked to overturn that decision. To do so, Defence needs to consider the available evidence. If the evidence is exactly the same as that available to the original decision-maker, and if Defence wished to recommend a revised award, it would need to overturn the original decision. Defence considers it inappropriate and unwise to overthrow a judgement made by a competent authority that had a much greater understanding of the events than Defence could more than 50 years later.

Mr Sullivan's letter provides a "short summary of the facts identified by the Tribunal concerning Sheean, and how they compared with the facts available to the Admiralty in 1943". The letter states that…."the facts as determined are manifestly different to those presented to the British Admiralty and advanced on those considered in the Valour Inquiry".

The Government considered the Tribunal report and recommendations and deemed that the Tribunal review does not present any "compelling new evidence" that might support reconsideration of the decision.

Clearance Officer	Justine Grieg, Deputy Secretary Defence People, Ph: 02 6265 7339
Clearance Date	18 May 2020
Contact Officer	Petrina Cole, Director Honours and Awards, Ph: 02 6127 2516

Consultation	Defence General Counsel – Anna Rudziejewski CDF Legal Officer - Katherine Holder

s47E(d) [redacted]

s47E(d)

- [redacted]

s47E(d)



Senator the Hon. Linda Reynolds CSC
Minister for Defence

Dear Minister,

I am writing to you regarding the denial of Seaman Edward Sheean's appeal to the Defence Honours and Awards Appeals Tribunal.

A direct quote from the Australian Department of Defence web page:

"The *Victoria Cross for Australia* is the pre-eminent award for acts of bravery in wartime and Australia's highest honour. The Victoria Cross for Australia is awarded to a person who, in the presence of the enemy, displays the most conspicuous gallantry, or daring or pre-eminent act of valour or self-sacrifice or extreme devotion to duty."

Edward (Teddy) Sheean:

A direct quote from the Royal Australian Navy web page:

"Shortly before 14:00 on 1 December 1942, *Armidale*, by then separated from *Kuru*, was attacked by no less than thirteen aircraft. The corvette manoeuvred frantically. At 15:15 a torpedo struck her port side and another hit the engineering spaces; finally a bomb struck aft. As the vessel listed heavily to port, the order was given to abandon ship. The survivors leapt into the sea and were machine-gunned by the Japanese aircraft. Once he had helped to free a life raft, Sheean scrambled back to his gun on the sinking ship. Although wounded in the chest and back, the 18-year-old sailor shot down one bomber and kept other aircraft away from his comrades in the water. He was seen still firing his gun as *Armidale* slipped below the waves. Only 49 of the 149 men who had been on board survived the sinking and the ensuing days in life rafts.

Sheean was mentioned in dispatches for his bravery and in 1999 a Collins Class submarine was named after him - the only ship in the RAN to bear the name of a sailor."

This occurred just 28 days before his 19th birthday.

Criteria for the *Victoria Cross for Australia*:

Is awarded to a person who, in the presence of the enemy, displays:

- The most conspicuous gallantry, **or**
- Daring **or**
- Pre-eminent act of valour **or**
- Self-sacrifice **or**
- Extreme devotion to duty.

Most would agree that Seaman Edward Sheean's actions answered, not one, but all of these criteria, yet you confirmed that the Defence Honours and Awards Appeals Tribunal have denied him the *Victoria Cross for Australia* because " **His actions did not reach the particularly high standard for Australia's highest wartime honour**"

Could you please explain to me how his actions did not reach the standard required.

Yours faithfully,

Robert Douglas Reidy ex RAN Leading Seaman

s22

The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for the Centenary of ANZAC

MEDIA RELEASE

Thursday, 7 March 2019

PUBLIC HEARINGS FOR THE DEFENCE HONOURS AND AWARDS APPEALS TRIBUNAL REVIEW OF RECOGNITION FOR EDWARD 'TEDDY' SHEEAN

RECOGNITION for the late Ordinary Seaman Edward 'Teddy' Sheean will be reviewed by the independent Defence Honours and Awards Appeals Tribunal in Hobart later this month.

The review follows an application by Tasmanian Minister for Veterans' Affairs, the Hon Guy Barnett MP, who is seeking a Victoria Cross to recognise Ordinary Seaman Sheean's actions during the sinking of HMAS *Armidale* during the Second World War.

Minister for Defence Personnel Darren Chester said he was pleased the Tribunal is holding public hearings as part of this review and is confident it will resolve this longstanding issue for Teddy Sheean's family.

"Teddy Sheean was a loader of one of HMAS *Armidale*'s three Oerlikon anti-aircraft guns when, on 1 December 1942, the ship came under sustained attack from Japanese aircraft and started to sink," Mr Chester said.

"When the order was given to abandon ship, it was recounted that Sheean returned to the gun, strapped himself in and started firing at the incoming aircraft. As the ship continued to sink, he shot down one Japanese aircraft and remained at the gun until he was killed."

The Tribunal will hear submissions from Minister Barnett, Mr Garry Ivory on behalf of the Sheean family, and representatives from the Department of Defence. The Tasmanian Branch of the Returned & Services League will also make a submission.

"I look forward to receiving the Tribunal's recommendations, once the hearings and the Tribunal's further deliberations are completed," Mr Chester said.

The Tribunal's hearings will be held on the afternoons of 25 and 26 March 2019 at Hobart Town Hall. Further information, including how to register to attend the hearings, is available on the Tribunal's website.

ENDS