



## Australian Government

### Defence Honours and Awards Appeals Tribunal

#### Chief Petty Officer John David Anderson and the Department of Defence [2012] DHAAT (4 October 2013)

File number 2012/014

Re **Chief Petty Officer John David Anderson**  
Applicant

And **Department of Defence**  
Respondent

Tribunal Mr Alan Rose AO (Presiding Member)  
Dr Jane Harte  
Brigadier Gary Bornholt AM, CSC (retd)

Hearing Dates 14 February 2013  
17 May 2013

#### DECISION UNDER REVIEW

The decisions of the Department of Defence most recently made on 27 July 2012 refusing to recommend the award of the Australian Active Service Medal with Clasp 'KUWAIT' to Chief Petty Officer John Anderson and the refusal to recommend reinstatement to Chief Petty Officer Anderson of his Australian Service Medal with Clasp 'KUWAIT'.

#### DECISION

On 4 October 2013 the Tribunal decided:

To set aside the decision of the Department of Defence to refuse to recommend Chief Petty Officer John Anderson for the Australian Active Service Medal with Clasp 'KUWAIT' and substitute it with a new decision to recommend that Chief Petty Officer Anderson be awarded the Australian Active Service Medal with Clasp 'KUWAIT';

As the recommendation by the Director Honours and Awards to the Governor-General that the Australia Service Medal with Clasp 'KUWAIT' held by Chief Petty Officer Anderson should be cancelled was *null and void ab initio*, Chief Petty Officer Anderson still holds the Australia Service Medal with Clasp 'KUWAIT'; and

To recommend to the Minister that he forwards a copy of this Decision to the Chief of the Defence Force (CDF) formally requesting that the CDF consider recommending to the Governor-General that, as the recommendation to cancel the Australian Service Medal with Clasp 'KUWAIT' has been found to be *null and void ab initio*, she reinstate not only the Australian Service Medal with Clasp 'KUWAIT' to Chief Petty Officer Anderson but also to each of the other recipients (61) of the Australian Service Medal with Clasp 'KUWAIT' among the former ship's company of HMAS *Canberra*.

### **NOTE TO THE TRIBUNAL'S DECISION**

At the time of considering these decisions by the Department of Defence concerning Chief Petty Officer Anderson, the Tribunal also had under consideration a review of similar decisions most recently made on 6 May 2010 in regard to another applicant who also served in HMAS *Canberra* ('the other Applicant'). A separate Tribunal decision in similar terms to the above decision concerning Chief Petty Officer Anderson has been made in the other case.

### **CATCHWORDS**

Australian Service Medal with Clasp 'KUWAIT' for ship's company of the guided missile frigate HMAS *Canberra* for service on operation DAMASK VI. Purported cancellation found to be null and void.

Refusal to recommend members of the ship's company of the guided missile frigate HMAS *Canberra* for the Australian Active Service Medal with Clasp 'KUWAIT' for service on Operation DAMASK VI.

### **LEGISLATION**

*Defence Act 1903*, S110VB

Defence Force Regulations 1952 (as amended)

Australian Active Service Medal Regulations (as amended)

Australian Service Medal Regulations (as amended)

## REASONS FOR DECISION

### Introduction

1. The Applicant, Chief Petty Officer John David Anderson, enlisted in the Royal Australian Navy (RAN) on 27 June 1990. He was posted to the guided missile frigate HMAS *Canberra* from August 1992 to June 1994. *Canberra* was deployed to the Red Sea on Operation DAMASK VI (OP DAMASK VI) between November 1992 and March 1993. For this service, on 8 April 1993, Chief Petty Officer Anderson was awarded the Australian Service Medal with Clasp 'KUWAIT' (the ASM). Chief Petty Officer Anderson discharged from the RAN on 8 August 2005 and currently serves in the RAN Reserve.
2. In June 2009, as a result of a review of the nature of the service rendered by the personnel on OP DAMASK VI an additional operational area was included under Schedule 2 of the *Veterans' Entitlement Act of 1986* by the *Social Security and Other Legislation Amendment (Pension Reform and Other Budget Measures) Act 2009*.
3. Following a subsequent declaration that the operation between 13 and 19 January 1993 was "warlike", a separate recommendation was made to the Governor-General that eligibility for the Australian Active Service Medal with Clasp 'KUWAIT' (the AASM) be extended to the ship's company of *Canberra*. This was done through an amendment to the Declaration and Determination made under the AASM regulations.
4. On 17 January 2011 Chief Petty Officer Anderson applied for the AASM. The Directorate advised him by a letter dated 16 February 2010 (*sic*) that, although he was qualified for the AASM, he would not be issued with this award until he had first returned his ASM.
5. Chief Petty Officer Anderson replied to the Directorate's letter of 15 February 2010/2011 whilst authorising his brother Mr Charles Anderson and sister-in-law Mrs Julie Anderson to act on his behalf. Mr and Mrs Anderson each, via emails on the 20 January 2011 and 9 March 2011 respectively, requested clarification from Senator the Hon. David Feeney, Parliamentary Secretary for Defence, on matters pertaining to Defence's 'double medalling' policy and aspects of DAMASK I-VI history and publicity surrounding the issuing of the AASM with Clasp 'KUWAIT'. Senator Feeney responded to Mr Anderson on 3 March 2011 and to Mrs Anderson on 13 April 2011.
6. With no reference to Chief Petty Officer Anderson, on 28 February 2011, Mr Pat Clarke, the Director of Honours and Awards recommended to the Governor-General that Chief Petty Officer Anderson's ASM be cancelled. This was approved by the Governor-General on 3 March 2011. Mr Clarke purported to act under the provisions of the Regulations and the Declaration and Determination of the ASM of 29 October 2009 which was thought to be consistent with Defence's 'double medalling' policy.<sup>1</sup>

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<sup>1</sup> Information on this policy can be found at paras 31-33 and 47-52.

7. Chief Petty Officer Anderson seeks review of the decisions of the Department of Defence refusing to recommend to the Governor-General the award to him of the AASM in addition to his retaining the ASM.

### **The Tribunal's Jurisdiction**

8. The Tribunal has jurisdiction to hear and determine Chief Petty Officer Anderson's application for review, see ss110T; 110V(1)(a)(ii), 110VB(2) of the *Defence Act* 1903 and reg. 93C of the Defence Force Regulations 1952.

### **Steps taken in the conduct of this review**

9. On 7 June 2012, in accordance with the Tribunal's Procedural Rules, the Tribunal informed the Directorate of Chief Petty Officer Anderson's application for review and asked that it make a submission and provide the Tribunal with all relevant material. A written submission was provided by the Directorate on 27 July 2012.

10. On 14 August 2012 Chief Petty Officer Anderson was provided with a copy of the Defence submission. He was invited to respond providing any comment and any further material he wished to put before the Tribunal. These comments, dated 31 August 2012, were received by the Tribunal on 1 September 2012.

11. On 17 January 2013 the Tribunal requested further information from the Directorate. A further response was provided on 7 February 2013 and a copy of this document was also provided to Chief Petty Officer Anderson on 18 February 2013. Chief Petty Officer Anderson's comments were received on 20 July 2013.

12. The Tribunal met on 14 February 2013 prior to conducting a telephone interview with Chief Petty Officer Anderson (and a telephone interview on the same day with the other Applicant) to consider all the material provided by the Directorate and Chief Petty Officer Anderson up to that point.

13. After deliberating on the evidence and arguments put by the other Applicant and the Directorate, the Tribunal heard oral evidence (by telephone) on 14 February 2013 from Chief Petty Officer Anderson.

14. The Tribunal wrote on 1 May 2013 requesting further information from the Directorate and received a response on 14 May 2013.

15. The Tribunal held another hearing on 17 May 2013 to consider the additional submission made by the Directorate and to receive further oral submissions from officers of the Directorate. The Tribunal made available to Chief Petty Officer Anderson (and the other Applicant) copies of the additional submissions from the Directorate including a record of the oral submissions made by the Directorate on 17 May 2013 for their comment.

16. During the hearing of 17 May 2013 the Tribunal again sought additional material referred to by the Directorate and in particular asked that the Directorate

provide copies of all legal advice obtained during the preparation of the amendments made to the Declarations and Determinations of the ASM and AASM in October 2009, and any legal advice obtained before recommending the cancellation of the ASM awarded to Chief Petty Officer Anderson in 1993.

17. The Tribunal wrote again to the Directorate on 8 August 2013 as no material had been received in response to the agreements reached at the hearing on 17 May 2013. The Directorate responded on 5 September 2013 providing additional information. A copy of this further submission was made available to Chief Petty Officer Anderson and the other Applicant for any further comment they wished to make. These comments were received by the Tribunal on 30 September 2013 and in particular Chief Petty Officer Anderson brought to the Tribunal's attention that his ASM '*was only cancelled [in] 2011, after I started making enquiries ...*'.

18. The response from the Directorate dated 5 September 2013, among other things, confirmed that no legal advice was sought prior to the making of changes to the eligibility provisions of the ASM and AASM and also that no legal advice was sought before the recommendation to cancel Chief Petty Officer Anderson's ASM was forwarded to the Governor-General. The Directorate also said that:

*Advice from Defence Legal on a number of occasions has been that honours and awards regulations are matters of policy and not law. They are executive/prerogative instruments in that they are matters of the executive and are not entitlements made under the authority of a legislative framework subject to review and scrutiny of parliament. The Department of the Prime Minister and Cabinet (PM&C), as the agency responsible for overarching administration of the Australian honours and awards system, have also supported and agree to this advice.*

In this regard the Tribunal notes that questions about eligibility etc. for Defence awards are justiciable under the provisions of the *Defence Act 1903* and any decisions by the Tribunal are themselves reviewable on questions of law by the Federal Court.

19. At the end of the 5 September 2013 response the Director also said:

*DH&A is presently seeking legal advice on a form of words for an exclusion provision that fully explains the intent and consequential action that will apply to those members of the Canberra complement affected by the nature of service upgrade. On agreement, this provision will be submitted to the Governor-General for incorporation in a revised determination.*

20. The Tribunal is concerned about the implications of this statement that no matter what the law is nor what decisions the Tribunal may make on Chief Petty Officer Anderson's application, it would appear that the Director will take whatever further action is required to ensure her view prevails.

21. The Tribunal has chosen on this occasion to treat this statement as being an expression of excessive zeal by the Director and not amounting to contempt or disrespect for the jurisdiction of the Tribunal.

22. On 12 September 2013, the Tribunal wrote to Defence seeking further information on its legal position set out in the 5 September submission. At the time of reaching its decision no response had been received by the Tribunal from Defence.

### **Background – OP DAMASK VI**

23. When Iraq invaded Kuwait in 1991 and the first Gulf War ensued, Australia's initial maritime contribution to the coalition force was the deployment of HMA Ships to the Gulf of Oman and the Persian Gulf, with the primary role being to enforce the United Nations sanctions imposed on Iraq. These deployments were given the names OP DAMASK I to OP DAMASK III. Later deployments, OP DAMASK IV to OP DAMASK VII, deployed to the Red Sea area to extend the enforcement of sanctions.

24. *Canberra* was deployed on OP DAMASK VI from November 1992 to March 1993. The ship arrived in the area of operations (AO) of the Red Sea on 13 November 1992 and commenced operations. After completing a Christmas and New Year port visit to Naples, *Canberra* resumed operations in the Red Sea on 6 January 1993. During the operations, *Canberra's* ship's company conducted boardings on cargo shipping in the area to enforce United Nations sanctions.

25. Between 13 and 19 January 1993, *Canberra* was re-tasked from sanctions enforcement to operate as the anti-air escort for the on-station Red Sea ready strike platform, the American destroyer USS *Caron*. This was during a time of heightened tensions between the Iraqi Government and international forces and USS *Caron* was on stand-by to fire against Iraqi targets. On 17 January 1993, USS *Caron* fired a salvo of 12 Tomahawk land attack missiles on a nuclear research facility in Baghdad. On 20 January, *Canberra* reverted to its sanctions enforcement task by resuming boarding operations until its departure from the AO on 12 March 1993.

26. While still deployed, the Commanding Officer of *Canberra*, Commander Raydon Gates RAN, announced to the ship's company that as of 28 January 1993, 'the ship had completed 60 days service in the AO and the award of the Australian Service Medal had been earned'<sup>2</sup>. There was much ceremony and publicity surrounding the presentation of those ASMs at the end of the deployment, with each member of the ship's company (including Chief Petty Officer Anderson) having the ASM personally presented by Senator Robert Ray, Minister for Defence, in the presence of the Shadow Minister of the day, Senator Robert Hill and the Maritime Commander, Rear Admiral Robert Walls RAN, all of whom were flown by helicopter to the ship as it entered Sydney Heads on 10 April 1993.<sup>3</sup>

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<sup>2</sup> *Canberra* Report of Proceedings 1-31 January 1993, dated 5 February 1993, received undercover of Minute from A/Director of Honours and Awards, AF11085298 dated 27 July 2012.

<sup>3</sup> In addition, many ship's company family members were on board to witness this event, as they had been invited to join the ship in Darwin for a Family Cruise on the last leg of the return passage to Sydney.

27. On 29 June 2009 (i.e. 16 years later) a review of the nature of service by Defence decided that the nature of OP DAMASK VI service during the period 13-19 January 1993 (6 days in a total of the 120 day deployment) of OP DAMASK VI should be declared “warlike” service and that the AO should be included as an additional “operational area” for the purposes of the veterans’ entitlement legislation. This was the period in which *Canberra* provided an escort for USS *Caron* when it fired cruise missiles into Iraq.

28. There was no legal or compelling policy reason to align the eligibility requirements for veterans’ entitlements to medallic recognition for the whole or any part of the operational service of *Canberra* during OP DAMASK VI. Some within the Department of Defence concerned with the review, however, saw it as imperative that there be consistency between eligibility for veterans’ entitlement and for medallic recognition for the six day period. This view and the expectations of a number of naval personnel that “upgraded” medallic recognition would be provided to those that served during the six day period led to recommendations to the CDF which he accepted on 2 September 2009 that for almost all members of the ship’s company of *Canberra*, medallic recognition of service during the whole of OP DAMASK VI, that is their peacetime service, non-warlike service and warlike service should now be provided retrospectively by the award of the AASM only. The Parliamentary Secretary for Defence Support on 13 October 2009 recommended to the Governor-General that she make new Declarations and Determinations for the ASM and the AASM to effect these changes. The submission to the Parliamentary Secretary indicated that the purpose of the changes was to provide eligibility for the AASM for OP DAMASK VI and to remove any further eligibility for the ASM to the members of the ship’s company now eligible for the AASM. The Parliamentary Secretary was also informed that, “In accordance with established policy [to prevent ‘double medalling’] personnel will be required to return the ASM before the AASM can be issued to them....” [subject to limited exceptions where some crew members held other Clasps to the ASM; in which cases those crew would be able to retain the ASM].<sup>4</sup>

### **Background – ASM and AASM**

29. There have been a considerable number of changes made over the years to the eligibility conditions for the ASM and AASM with respect to service in the Persian Gulf and Red Sea areas. A summary of the effect of these changes is set out in **Attachment A**.

30. With respect to this application for review by Chief Petty Officer Anderson the relevant eligibility provisions for the ASM and AASM are set out below:

- ASM – in April 1993 Chief Petty Officer Anderson qualified for and was awarded the ASM because he was “a member of the Australian Defence Force who rendered military service as such a member in the prescribed operational area of the Persian Gulf while posted to or serving in connection with the

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<sup>4</sup> Ministerial Submission CDF/OUT/2009/865 of 4 October 2009.

military deployment for a period of not less than an aggregate of 60 days during the prescribed eligibility periods<sup>5</sup> (i.e. after 1 March 1991).

- AASM – after 29 October 2009 Chief Petty Officer Anderson was also eligible for the AASM because he was "a member of the Australian Defence Force who rendered assigned service as such a member of the Australian element for duty"<sup>6</sup> during OP DAMASK VI on *Canberra* between 13 and 19 January 1993.

### **Background – ‘Double Medalling’ Policy**

31. The Directorate informed the Tribunal that the changes made to the Declarations and Determinations of the ASM and AASM in October 2009, while implementing policy decisions made following the Nature of Service Review were also necessary to give effect to the Government’s ‘double medalling’ policy. The Tribunal notes that there is no reference to, or elaboration of such a policy in the Defence Honours and Awards Manual. Material put to the Tribunal by the Directorate did not clarify either the content or the authority for saying that there was a Government policy against ‘double medalling’.

32. The Tribunal proceeded therefore on the basis that there may be a ‘double medalling’ policy which is a policy of the Department of Defence whose content is not completely clear, and may have changed from time to time. It also seems to be a policy applicable when Defence is considering whether or not to establish a new medal rather than one concerning decision-making about the eligibility of an individual applicant for an already established Defence award.

33. The Tribunal sought but was unable to obtain a clear answer from the Directorate as to why this Departmental ‘double medalling’ policy was now sought to be applied to *Canberra*’s operational service in 1992-93 when it had not been applied in similar circumstances with respect to the naval units involved in OP DAMASK I and OP DAMASK II. The Tribunal also noted that it was relevant to its understanding of the application of the ‘double medalling’ policy in circumstances operationally similar to those of *Canberra* in 1992-93 how Defence had applied the policy with respect to operations in East Africa with the award of both the ASM and AASM with Clasp ‘SOMALIA’ and other operations such as those in East Timor (see the table in **Attachment B** which sets out the medallic recognition for each of these relevant operations.)

### **Evidence and arguments**

#### **The Applicant**

34. The first argument put forward by the Applicant is that Gazette S188 and S189 outline entitlements to both ASM and AASM for DAMASK VI and put forward no argument to remove the ASM. As set out in S189, the requisite period of service of 30 days was met by *Canberra*’s ship’s company up until the declaration of ‘warlike’

<sup>5</sup> Commonwealth of Australia Gazette No GN18, dated 15 May 1991.

<sup>6</sup> Commonwealth of Australia Gazette No S188, dated 13 November 2009.



service from 13 January to 19 January 1993. During the latter period, the ship's company became eligible for the AASM, as set out in S188.

35. The second argument put by the Applicant is that both the ASM and the AASM entitlements were established during the deployment of *Canberra* in the Red Sea between November 1992 and March 1993 in circumstances paralleling the earlier OPs DAMASK I and DAMASK II. The Applicant argues that *Canberra* rendered two very distinct types of service, one "warlike" and the other "non-warlike".

36. The third argument of the Applicant centres on the Directorate's authority in applying the so-called '*double medalling*' policy to his application. He holds that:

- a) the '*double-medalling*' policy was initiated in 1993 and should not be applied retrospectively, and in any case
- b) Gazettes S85 and S86 allow for the issue of both ASM/AASM Somalia 1992 to 1995 for two components of the same operation,
- c) during DAMASK I HMAS *Success* and HMAS *Adelaide* were awarded both medals for the same operation, and
- d) during DAMASK II HMAS *Brisbane* and HMAS *Sydney* were awarded both medals for the operation.

#### **Directorate - Department of Defence**

37. The Defence position, put by the Directorate, maintains that current policy is that the AASM takes precedence over the ASM for the OP DAMASK VI deployment, hence *Canberra* personnel cannot be awarded both medals for the same service in accordance with the '*double medalling*' policy. Therefore, any member of the *Canberra* ship's company applying for the AASM has been advised that they must first return their ASM in order to receive it. The Directorate also maintains, on the basis of policy, that an application for the AASM in such circumstances provides the authority to recommend to the Governor-General the cancellation of an applicant's ASM (as was done in Chief Petty Officer Anderson's case).

38. The Defence submission of 27 July 2012 in particular drew attention to the following paragraph in the Declaration and Determination under the Australian Service Medal Regulations as providing the basis for the application of the '*double medalling*' policy:

- (d) *Determine, for the purposes of this determination, that where an entitlement exists to the Australian Active Service Medal (AASM) with Clasp 'KUWAIT' for service on Operation DAMASK VI that commenced on 13 January 1993 and ended on 19 January 1993, a person is not eligible for an award of the Medal where the entitlement to the Medal arises for the same rotation deployment as gave rise to the entitlement for the AASM with Clasp 'KUWAIT'.<sup>7</sup>*

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<sup>7</sup> Commonwealth of Australia Gazette No. S189, 13 November 2009, p 4.

39. The application of the policy to the Applicant's award of the ASM and eligibility for the AASM is further elaborated in the Directorate's supplementary submission of 7 February 2013 in which it said:

3. *Prior to 1994 there was no policy on 'double medalling'. Because Operations DAMASK I and II fell within this period members serving during these operations were able to be awarded the Australian Active Service Medal with Clasp 'KUWAIT' and the Australian Service Medal with Clasp 'KUWAIT' as there was no provision within the Gazettes to prohibit this.*

4. *Prior to hearing submissions for Reference C [Report of the Committee of Inquiry into Defence Awards 1994 (CIDA)], the committee developed a Statement of Principles containing ten principles, one of which was that only one medal within the Australian system of honours and awards should be given in recognition of a single period of service except in the case of a major conflict where Campaign medals may be awarded.*

5. *This Statement of Principles was adopted by the Government and was re-affirmed in Cabinet in 1997<sup>8</sup>, that, only one Australian military service medal is awarded to recognise a single type of service. However, separate medals may be established for each major campaign or conflict. This principle has since been re-affirmed by successive Governments and has also been mentioned and accepted in the Korean Service Review<sup>9</sup> and the Defence Honours and Awards Review.*

6. *Since the CIDA (Reference C) was released, this principle has been adopted as policy and provision to prohibit 'double medalling' has been, where necessary, notated in each subsequent determination in Gazettes released since 1994. An example can be seen in paragraph (d) of Attachment B<sup>10</sup> to the Directorate's original submission of 27 July 2012 to the Tribunal.*

7. *Even though Operation DAMASK VI occurred prior to the middle of 1993, as were (sic) Operations DAMASK I and II, the award of the Australian Active Service Medal with Clasp 'KUWAIT' was issued retrospectively in 2009 for Operation DAMASK VI. Therefore it was issued under the Government accepted policy preventing 'double medalling'.*

### **Tribunal's Consideration of the Issues and Arguments**

40. The crux of the Applicant's argument is that:

- he is eligible for the AASM because his service in 1993 satisfied the requirements of the relevant Regulations and Declaration and Determination made on 29 October 2009;

<sup>8</sup> Cabinet Submission of 1997.

<sup>9</sup> *Report of the Post Armistice Korean Service Review of December 2005.*

<sup>10</sup> *Commonwealth of Australia Gazette No. S189 of 13 November 2009 Instrument of declaration and determination for the Australian Service Medal with Clasp 'KUWAIT'.*

- he is eligible for the ASM because his service in 1992/93 satisfies the requirements of the relevant Regulations and Declaration and Determination made on 29 October 2009, and
- there is no valid argument for the necessity to return the ASM to be awarded the AASM for his service during DAMASK VI.

41. The *Macquarie Concise Dictionary* defines “eligible” as fit or proper to be chosen and “entitled” as giving a right or claim to something. Quite clearly a holder of an award cannot at the same time be a claimant for the same award. The condition in paragraph (d) of the 2009 ASM Determination therefore could not have been applied legally to Chief Petty Officer Anderson.

42. The Directorate on the other hand says that the changes to the Declarations and Determinations made in 2009 to eligibility for the ASM and AASM clearly indicate that the Government’s intention was for the ship’s company of *Canberra* during OP DAMASK VI should receive only the AASM and those changes made especially by the inclusion of paragraph (d) in the 2009 ASM Determination empowers the Directorate to recommend cancellation of the ASM of former members of the ship’s company who subsequently apply for the AASM. The Government also intended and empowered the Directorate to leave other former members of the ship’s company to retain their ASMs whether or not they fell within the exception category (of already having other clasps to their ASM).

43. The Tribunal accepts that the arguments of the Applicant are correct. It believes that a proper analysis of the applicable instruments including the provisions of the *Defence Act 1903* and the Defence Force Regulations 1952 (as amended) establishing the ASM and AASM as Defence Awards is that all members of *Canberra’s* ship’s company who received the ASM in April 1993 are legally able to retain that award and are also eligible, if they were serving on *Canberra* from 13 to 19 January 1993, for the award of the AASM. The only members of the ship’s company of *Canberra* during those periods who are caught by the condition set out in paragraph (d) of the ASM Determination and Declaration of 29 October 2009 are those who had not prior to that date been awarded the ASM but who were eligible for the award and had at that time a current entitlement.

44. The Tribunal is strengthened in this view because it accords with the application of the Australian common law rule (incorporated in a number of provisions of the *Acts Interpretation Act 1901*, Cwlth) that there is a rebuttable presumption when interpreting a Commonwealth enactment that it does not have retrospective effect unless the law expressly provides for such operation or, given the nature and content of the law taken as a whole, it must by necessary implication apply retrospectively. The 2009 ASM Declaration and Determination relevant to this Application, despite what may have been the policy intention of the Defence authorities, clearly does not apply to a holder of the ASM but only to a person eligible or entitled to that award. If it had been the intention to apply the exclusion contained in paragraph (d) to a holder of the ASM the paragraph should have gone on to provide for the withdrawal and cancellation of the award.

45. The Tribunal finds additional support for its view in that while the ‘*double medalling*’ policy was considered as part of the policy deliberations within Defence

before the changes to the AASM and ASM Declarations and Determinations were recommended to the Minister in 2009, the policy's application was partial, contradictory and discriminatory. There seems to have been some misunderstanding in Defence that there was a legal right to request the holders of the ASM voluntarily, or by command, to return their ASMs in exchange for a recommendation that they receive an AASM. The Directorate has been unable to refer the Tribunal to any legal authority for such a request/command being made nor to any legal authority to support their purported cancellation recommendations, including in Chief Petty Officer Anderson's case. The Directorate's recommendations have led to the cancellation of 62 ASMs of the former ship's company of *Canberra*.

46. In response to the Tribunal's questions the Directorate provided documents which indicated that the Director had signed the letter to the Governor-General recommending that Chief Petty Officer Anderson's ASM be cancelled. Other documents provided clearly showed that the decisions with respect to Chief Petty Officer Anderson's application for the AASM and his refusal to return his ASM were in fact taken by officers of the Directorate who held no delegations from the CDF. These documents also revealed that the Director played no part in these deliberations before decisions were conveyed to Chief Petty Officer Anderson. The Directorate's providing of a copy of the form letter and schedule including Anderson's name that was sent to the Governor-General at the time of the cancelling of his ASM confirmed that this was what had happened. The Tribunal asked for, and the Directorate was unable to provide, any legal advice to support their course of action. The Tribunal concluded that the Director had merely signed the form letter to the Governor-General, and had not made the decision to recommend. The Director had in effect had his recommendation "dictated" by the other officers of the Directorate who had made the relevant decisions and had communicated them to Chief Petty Officer Anderson.

#### ***'Double Medalling' Policy - Consideration***

47. The Directorate maintained throughout that the *'double medalling' policy* not only provided the policy basis for paragraph (d) of the 2009 ASM Determination but also provided it with authority to cancel the ASM held by all those who applied for the AASM following the extension of eligibility by changes to the Declaration and Determination of the AASM in 2009.

48. The Directorate claimed that prior to 1994 there was no *'double medalling' policy*. And, although OP DAMASK VI occurred prior to the middle of 1993, the award of the AASM was approved retrospectively in 2009 for that operation and was issued under the accepted Government policy preventing *'double medalling'*.<sup>11</sup>

49. In response to questioning by the Tribunal at the hearing with the Directorate on 17 May, officers said the references to 1993 and 1994 were to changes made by a Cabinet Decision in the middle of 1993. That Cabinet decision had been referred to on numerous occasions by officials and others in a number of on-going policy contexts and inquiries as the basis for what the Directorate now calls the *'double medalling' policy*. In this regard the Tribunal notes that Cabinet decisions have, of

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<sup>11</sup> Letter, Directorate of Honours and Awards, 2013/1000155/1(5), AF12995782, 7 February 2013.

themselves, no legal effect and only have policy consequences directly for the particular Government (Prime Minister) that made the decision concerned. To have any influence on later Government's decision making, especially that of a Government of a different political persuasion, the substance of the particular Cabinet decision would need unequivocal adoption by that Government at the Cabinet level. The Directorate was unable to point to any such Cabinet decision by any Government since the Keating Government and specifically not by the Gillard Government.

50. The Directorate said that the 1994 *'double medalling' policy* it now applied prevented two campaign medals being awarded for service on any one deployment despite there being many examples where the nature of service during the deployment had resulted in it being re-designated as "warlike" from "non-warlike" and vice versa with the attendant consequences that eligibility for both the ASM and AASM could rightfully arise. The Directorate added that a further element of the 1994 *'double medalling' policy* was that in such circumstances the AASM which had a higher precedence value than the ASM would be the single campaign medal awarded and that paragraph (d) of the Declaration and Determination made on 29 October 2009 under the ASM Regulations by the Governor-General was consistent with its interpretation and implementation of the 1994 *'double medalling' policy*.

51. This interpretation of the *'double medalling' policy* seemed to the Tribunal to be completely at odds with the policy as it was explained in DEFGRAM 233/2001 in which it was said, among other things:

*Lastly, this policy should not be confused with situations in which the AASM and the ASM may be awarded for the one period of service, e.g. the Persian Gulf during 1990/91. In cases where a non-warlike operation becomes warlike due to a change of operational circumstances, this change of conditions allows the awarding of these two distinctly different medals to recognise the type of service rendered.*<sup>12</sup>

The Tribunal, to the extent that it was relevant to its consideration of the issues in this case, adopted the statement and explanation of the *'double medalling policy'* set out in DEFGRAM 233/2001.

52. The Tribunal considered that the material provided by the Directorate and obtained through its own research did not support the proposition that any part of the *'double medalling' policy* supported the recommendation to the Governor-General for cancellation of the ASM held by Chief Petty Officer Anderson.

### **Tribunal's Conclusions**

53. The Tribunal concludes:

- The Directorate had no legal basis on which to refuse to make a recommendation for the award of the AASM to Chief Petty Officer Anderson;

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<sup>12</sup> Department of Defence DEFGRAM 233/2001 *Awards for service in South-East Asia 1955-1989*, dated 2 July 2001.

- The Directorate’s recommendation (and subsequent cancellation) of Chief Petty Officer Anderson’s ASM by the Governor-General was *null and void ab initio*;
- The Directorate’s reliance on the ‘*double medalling*’ policy in support of its decisions to refuse to recommend Chief Petty Officer Anderson for the AASM and the cancellation of his ASM relied on irrelevant considerations as it was not established that, to the extent any such policy existed, it had ever been applied to decision making in an individual case rather than being taken into account at the time a new medal or the extension of an existing Defence award was being considered; and,
- All actions taken by officers of the Directorate to refuse to issue the AASM to Chief Petty Officer Anderson and to seek the cancellation of his ASM were without any legal authority as none of them held the required delegations from the CDF and did not provide any lawful basis for the recommendation made by the Director to the Governor-General that the ASM held by Chief Petty Officer Anderson be cancelled.

### **Tribunal’s Decision**

54. The Tribunal decides:

To set aside the decision of the Department of Defence to refuse to recommend Chief Petty Officer Anderson for the Australian Active Service Medal with Clasp ‘KUWAIT’ and substitute it with a new decision to recommend that Chief Petty Officer Anderson be awarded the Australian Active Service Medal with Clasp ‘KUWAIT’;

As the recommendation by the Director Honours and Awards to the Governor-General that the Australian Service Medal with Clasp ‘KUWAIT’ held by Chief Petty Officer Anderson should be cancelled was *null and void ab initio*, Chief Petty Officer Anderson still holds the Australian Service Medal with Clasp ‘KUWAIT’; and

To recommend to the Minister that he forwards a copy of this Decision to the Chief of the Defence Force (CDF) formally requesting that the CDF consider recommending to the Governor-General that, as the recommendation to cancel the Australian Service Medal with Clasp ‘KUWAIT’ has been found to be *null and void ab initio*, she reinstate not only the Australian Service Medal with Clasp ‘KUWAIT’ to Chief Petty Officer Anderson but also to each of the other recipients (61) of the Australian Service Medal with Clasp ‘KUWAIT’ among the former ship’s company of HMAS *Canberra*.

### **Note to the Tribunal’s Decision**

55. At the time of considering these decisions by the Department of Defence concerning Chief Petty Officer Anderson the Tribunal also had under consideration a review of similar decisions most recently made on 6 May 2010 in regard to another applicant who also served in HMAS *Canberra* (‘the other Applicant’). A separate

Tribunal decision in similar terms to the above decision concerning Chief Petty Officer Anderson has been made in the other case.

## **Establishment of the AASM with Clasp 'Kuwait'**

### **SUMMARY - AASM with Clasp 'Kuwait'**

Gazette No GN 11 of 20 March 1991 signed 26 February 1991

Gazette No GN 18 of 15 May 1991 signed on 17 April 1991

Gazette No S 195 of 27 May 1997 signed 31 March 1997

Gazette No S 188 of 13 November 2009 signed 29 October 2009

Details follow:

#### ***AASM with Clasp 'Kuwait'***

Gazette No GN 11 of 20 March 1991 signed by Governor-General on 26 February 1991

**Declared** service by ADF members with multinational military deployment in Persian Gulf which commenced on 17 January 1991 to be prescribed warlike operation for the award of AASM with Clasp 'Kuwait'.

#### **Determine**

##### *Conditions of award*

1. Member of ADF rendered service as such an Australian member-
  - Posted to a ship or unit of ADF;
  - Ship or unit is assigned for duty of a continuing nature;
  - Within that area in connection with multinational military deployment;
  - Render service in prescribed operational area for prescribed period
2. Member of ADF serving on exchange or secondment to Foreign Defence Force who rendered service as a member of that force if-
  - For prescribed period in prescribed operational area;
  - Posted to a ship or unit;
  - Which was assigned for duty of a continuing nature;
  - Within that area in connection with multinational military deployment.
3. ADF member of crew of military aircraft on a combat mission operating in connection with multinational military deployment for-
  - One operational sortie over prescribed operational area;
  - Service on or after 17 January 1991.
4. Member of ADF who rendered service as official visitor, inspections or other occurrences of temporary nature
  - On duty in prescribed operational area
  - For period of 30 days or aggregate.
5. Medal may be awarded to accredited members of approved philanthropic organisations-
  - Attached to Australian military contribution;
  - In declared operational area and during prescribed period;
  - In an official capacity for full time duty in uniform.



6. CDF or Delegate may deem that a lesser period of service is qualifying service;
  - If member's service was terminated due to death, evacuation owing to illness or injury or other disability due to service or
  - If member's service was terminated due to Government or Defence Force reasons.
7. Eligibility for award shall not (emphasis added) be affected by grant of any other award for service in prescribed operational area.
8. Reference to prescribed operational area same as operational area in Clause 2 Determination 3989 Gulf Allowance under Section 58B of Defence Act 1903.
9. Prescribed period is one day or more on or from 17 January 1991.

***AASM with Clasp 'Kuwait'***

Gazette No GN 18 of 15 May 1991 signed by Governor-General on 17 April 1991.

**Revoke** the declaration & determination made 26 February 1991

**Declare** the multinational military deployment in Persian Gulf from 17 January 1991 to 28 February 1991 to be prescribed warlike operation for the award of AASM with Clasp Kuwait.

**Determine**

*Conditions of award*

1. Member of ADF rendered service as such an Australian member-
  - Posted to a ship or unit of ADF;
  - Ship or unit is assigned for duty of a continuing nature;
  - Within that area in connection with multinational military deployment;
  - Render service in prescribed operational area for prescribed period
2. Member of ADF serving on exchange or secondment to Foreign Defence Force who rendered service as a member of that force if-
  - For prescribed period in prescribed operational area;
  - Posted to a ship or unit;
  - Which was assigned for duty of a continuing nature;
  - Within that area in connection with multinational military deployment.
3. ADF member of crew of military aircraft on a combat mission operating in connection with multinational military deployment for-
  - One operational sortie over prescribed operational area;
  - Service from 17 January 1991 to 28 February 1991.
4. Member of ADF who rendered service as official visitor, inspections or other occurrences of temporary nature
  - On duty in prescribed operational area

- For period of 30 days or aggregate.
5. Medal may be awarded to accredited members of approved philanthropic organisations-
    - Attached to multinational military deployment forces;
    - In prescribed operational area and during prescribed period;
    - In an official capacity for full time duty in uniform.
  6. CDF or Delegate may deem that a lesser period of service is qualifying service;
    - If member's service was terminated due to death, evacuation owing to illness or injury or other disability due to service or
    - If member's service was terminated due to Government or Defence Force reasons.
  7. Eligibility for award shall not (emphasis added) be affected by grant of any other award for service in prescribed operational area.
  8. Reference to prescribed operational area same as operational area in Clause 2 Determination 3989 Gulf Allowance under Section 58B of Defence Act 1903.
  9. Prescribed period is one day or more on or from 17 January 1991 to 28 February 1991.

***AASM with Clasp 'Kuwait'***

Gazette No S 195 of 27 May 1997 signed by Governor-General on 31 March 1997

**Revoke** the declaration & determination made 17 April 1991

**Declare**

- Multinational military deployment in Persian Gulf in the period
- 17 January 1991 to 28 February 1991
- To be prescribed operation.

**Determine**

*Conditions of the award*

1. Member of ADF rendered service whilst posted or serving as a member of Australian element of declared operation for prescribed period.
2. Member of ADF serving on exchange or secondment to Foreign Defence Force
3. Member rendered service by performed one operation sortie within duration of prescribed operation, 'prescribed period' is one day.
4. Member of ADF who rendered service as official visitor, inspections, temporary occurrences, prescribed period is 30 days or aggregate

5. Medal may be awarded to civilian members of Dept of Defence, accredited members of Australian Red Cross, and Salvation Army if they are-
  - Attached in official capacity;
  - Full time duty;
  - With Australian military contribution;
  - In declared operation for prescribed period.
  
6. CDF or Delegate may deem that a lesser period of service is qualifying service;
  - If member's service was terminated due to death, evacuation owing to illness or injury or other disability due to service or
  - If member's service was terminated due to Government or Defence Force reasons;
  - If member's service was terminated due to foreign Government or foreign Defence Force reasons.
  
7. Prescribed period is one day or more during 17 January 1991 to 28 February 1991.

***AASM with Clasp 'Kuwait'***

Gazette No S 188 of 13 November 2009 signed by Governor-General on 29 October 2009

**Revoked** the declaration & determination made 31 March 1997

**Declare**

Members of ADF engaged in the following warlike operations to be prescribed operations-

1. Multinational military deployment in Persian Gulf in the period from 17 January 1991 to 28 February 1991,
2. Operation 'Damask VI' service on HMAS *Canberra* from 13 January 1993 to 19 January 1993.

**Determine**

*Conditions of the award*

1. Medal awarded to an ADF member, rendered assigned service as member Australian element for duty in prescribed operation for prescribed period, being not less than one day.
  
2. Member of ADF rendered assigned service as member Australian element for prescribed period as part of contribution of Foreign Defence Force on an approved third country deployment to a prescribed operation whilst on exchange or secondment to the Foreign Defence Force, being not less than one day.
  
3. Medal awarded to an ADF member, rendered assigned service as member Australian element for duty in prescribed operation, who completed prescribed number of sorties during prescribed operation for a period not less than 30 days or aggregate.

4. Medal awarded to member of ADF who rendered service as official visitor, inspections, temporary occurrences, with military contribution in prescribed operation for prescribed period being not less than one day or prescribed number of sorties, defined as one operational sortie assigned to prescribed operation.
5. If a member does not complete the prescribed period or prescribed number of sorties required-
  - owing to his death;
  - evacuation due to illness, injury or physical disability due to service in prescribed operation;
6. Member is deemed to have completed prescribed period or prescribed number of sorties.

## **AUSTRALIAN SERVICE MEDAL (ASM) History**

The ASM was established to recognise service rendered by ADF members in prescribed peacekeeping or non-warlike operations.

### ***Letters Patent:***

Commonwealth of Australia Gazette No S 336 of 2 November 1988 signed by the Governor-General on 13 September 1988

Australian Service Medal *Regulations* attached to Schedule of the above gazette provides for

- Each operation has clasp;
- Needs to be 'prescribed operation' by Governor-General;
- Governor-General on Minister's recommendation may declare non-warlike military operation;
- For operations on or after 14 Feb 1975.

### ***Conditions of award:-***

- Awarded for service in or in connection with prescribed operation;
- Award conditions determined by Governor-General on Minister's recommendation;
- Subsequent awards to same person shall be a further clasp;

### ***Persons eligible:-***

- Members of ADF who served in prescribed operation; and
- Minister to determine class of persons who have served.

### ***General Conditions***

- Medal only awarded to a person who fulfils the conditions of the Medal.
- Awards of Medal only made by Governor-General on recommendation of CDF or delegate
- Design of Medal prescribed
- Governor-General determines manner of wearing
- Registrar of Awards appointed by Governor-General to maintain a register of awards made
- Governor-General may cancel & reinstate an award
- Where medal is cancelled the medal shall be returned and their name erased from the register
- Where the medal is reinstated, the Registrar shall restore the entry in the register.

### ***ASM Ministerial Determination dated 11 May 1992 but not gazetted (Robert Ray)***

ASM Regulations now apply to members of foreign defence forces who render service with ADF in prescribed operations (NB This has not been revoked)

## **Establishment of the ASM with Clasp 'Kuwait'**

### **SUMMARY - ASM with Clasp 'Kuwait'**

Gazette No GN 48 of 5 December 1990 signed 20 November 1990

Gazette No GN 18 of 15 May 1991 signed 18 April 1991

Gazette No S 408 of 18 August 1998 signed 14 August 1998

Gazette No S 189 of 13 November 2009 signed 29 October 2009

*Details follow:*

#### ***ASM with Clasp 'Kuwait'***

Gazette No GN 48 of 5 December 1990 signed by the Governor-General on 20 November 1990

**Declared** service by ADF members with multinational military deployment in Persian Gulf which commenced on 2 August 1990 to be prescribed operation for the award of ASM with Clasp Kuwait.

#### **Determine**

##### *Conditions of award*

1. Member of ADF rendered military service in prescribed operation
  - Member posted to or serving in connection with military deployment
  - Period commencing 2 August 1990
  - Not less than aggregate of 60 days during prescribed periods
2. Member of ADF serving on exchange or secondment to Foreign Defence Force
  - Render military service in prescribed operational area of Persian Gulf
  - Member posted to or serving in connection with military deployment
  - Not less than aggregate of 60 days during prescribed periods
3. CDF or Delegate may determine lesser period of service
  - If member's service was terminated due to death, evacuation owing to illness or injury or other disability due to service or
  - If member's service was terminated due to Government or Defence Force reasons.
4. Operational area in these regulations has the same meaning as Clause 2 of Determination 3989 Gulf Allowance made under Section 58B of the Defence Act 1903.

#### ***ASM with Clasp 'Kuwait'***

Gazette No GN 18 of 15 May 1991 signed by Governor-General on 18 April 1991

**Revoked** the declaration & determination made 20 November 1990

#### **Declare**

Multinational military deployment in Persian Gulf in the period

- 2 Aug 1990 to 16 Jan 1991 and
- From 1 Mar 1991 onwards

to be prescribed operation within prescribed period

## **Determine**

### *Conditions of award*

1. Member of ADF rendered military service in prescribed operation
  - Member posted to or serving in connection with military deployment
  - Not less than aggregate of 60 days during prescribed periods
2. Member of ADF serving on exchange or secondment to Foreign Defence Force
  - Render military service in prescribed operational area of Persian Gulf
  - Member posted to or serving in connection with military deployment
  - Not less than aggregate of 60 days during prescribed periods
3. CDF or Delegate may determine lesser period
  - if member's service was terminated due to death, evacuation owing to illness or injury or other disability due to service or
  - if member's service was terminated due to Government or Defence Force reasons.

### *ASM Clasp Kuwait*

Gazette No S 408 of 18 August 1998 signed by Governor-General on 14 August 1998

Revoked the declaration & determination made 18 April 1991

## **Declare**

### *Prescribed operations-*

1. Multinational military deployment  
Persian Gulf  
2 Aug 1990 - 16 Jan 1991  
Prescribed period not less than 7 days or aggregate
2. Multinational military deployment  
Persian Gulf  
Commenced from 1 March 1991  
Prescribed period not less than 30 days or aggregate

## **Determine**

### *Conditions of award*

1. Member of ADF rendered service in prescribed operation-
  - Posted to or serving as member of Australian element;
  - For prescribed operation for prescribed period
2. Member of ADF who rendered service for prescribed period
  - Part of contribution of foreign defence force
  - Whilst seconded to or on exchange with foreign defence force.
3. Member of ADF who rendered service for prescribed period-
  - For official visits, inspections & other temporary natured visits
  - Whilst assigned for duty with military contribution.
4. CDF or Delegate may determine lesser period -
  - if member's service was terminated due to death, evacuation owing to illness or injury or other disability due to service or

- if member's service was terminated due to Government or Defence Force reasons.

***ASM Clasp Kuwait***

Gazette No S 189 of 13 November 2009 signed by Governor-General on 29 October 2009

Revoke declaration & determination made 14 August 1998

**Declare**

*Prescribed Operation*

1. Multinational military deployment  
Persian Gulf  
2 Aug 1990 - 16 Jan 1991  
Prescribed period not less than 7 days or aggregate
2. Multinational military deployment  
Persian Gulf  
Commenced from 1 March 1991  
Prescribed period not less than 30 days or aggregate

**Determine**

*Conditions of award*

1. Member of ADF rendered assigned service in prescribed operation-
  - As member of Australian element;
  - For prescribed operation for prescribed period
2. Member of ADF who rendered service for prescribed period
  - Part of contribution of foreign defence force
  - On third country deployment to prescribed operation
  - Whilst seconded to or on exchange with foreign defence force.
3. Member of ADF who rendered service for prescribed period-
  - For official visits, inspections & other temporary natured visits
  - For prescribed period 2 Aug 1990 - 16 Jan 1991 only
  - With the military contribution in the activity
4. A person who rendered assigned service as
  - Part of Australian element of the prescribed operation
  - Part of class of person determined by Minister

*Provided that* where a member does not complete the prescribed period for the award owing to-

- death,
- evacuation due to illness or injury
- or evacuation due to other service disability

then member is deemed to have completed that prescribed period.

**Determine**

For the purposes of this determination, that where an entitlement exists to AASM with Clasp 'Kuwait' for service on Op Damask VI that commenced on 13 January 1993 to 19 January 1993, a person is not eligible for an award of the Medal where the



entitlement to the Medal arises from the same rotation deployment as gave rise to AASM with Clasp 'Kuwait'.

## SUMMARY OF RECOGNITION FOR SERVICE FOR SERVICE IN SOMALIA

Award	ADF Operation	UN/US Operation	Start Date	End Date	Days	Gazette Notice
ASM-Somalia		Service with UNOSOM	17 Oct 1992	30 April 1993	30 days	S85 20 May 2011
AASM-Somalia		UNOSOM I	20 Oct 1992	3 May 1993	30 days	S108 13 Apr 1993
AASM-Somalia		Service with UNITAF or UNOSOM 2	17 Oct 1992	30 April 1993	30 days	S27 23 Jan 1997
AASM-Somalia	Battalion group & Naval component in OP SOLACE	UNITAF Op RESTORE HOPE	10 Jan 1993	21 May 1993	1 operational sortie/ 1 day	S86 20 May 2011 S102 27 Mar 2001 S27 23 Jan 1997 S108 13 Apr 1993
AASM-Somalia	Land and Air components of Second UN Operation		1 May 1993	28 Mar 1995	1 operational sortie/ 1 day	S86 20 May 2011 S102 27 Mar 2001 S27 23 Jan 1997

**SUMMARY OF RECOGNITION FOR SERVICE FOR SERVICE IN EAST TIMOR**

<b>Award</b>	<b>ADF Operation</b>	<b>UN/US Operation</b>	<b>Start Date</b>	<b>End Date</b>	<b>Days</b>	<b>Gazette Notice</b>
ASM-East Timor	Op FABER	UNAMET	19 Jun 1999	15 Sep 1999	30 days	S181 29 Sep 2006 S515 16 Dec 2004
ASM-East Timor	Op SPITFIRE		6 Sep 1999	19 Sep 1999	30 days	S181 29 Sep 2006 S515 16 Dec 2004
ASM-East Timor	Op CITADEL		18 Aug 2003	11 May 2006	30 days	S181 29 Sep 2006
AASM-East Timor	Op FABER	UNAMET	16 Sep 1999	23 Feb 2000	30 days - aggregate with non-warlike service	S515 16 Dec 2004 S110 9 Mar 2000
AASM-East Timor	Op WARDEN	INTERFET	16 Sep 1999	10 Apr 2000	1 operational sortie/ 1 day	S515 16 Dec 2004 S110 9 Mar 2000
AASM-East Timor	Op STABILISE	INTERFET	6 Sep 1999	23 Feb 2000	1 operational sortie/ 1 day	S515 16 Dec 2004
AASM-East Timor	Op TANGER	UNTAET	20 Feb 2000	19 May 2002	1 operational sortie/ 1 day	S515 16 Dec 2004 S110 9 Mar 2000
AASM-East Timor	Op CITADEL	UNSMIT	20 May 2002	17 Aug 2003	1 operational sortie/ 1 day	S515 16 Dec 2004

