



Australian Government

Defence Honours and Awards Appeals Tribunal

Fulcher and the Department of Defence [2020] DHAAT 08 (14 May 2020)

File Number 2019/014

Re **Mr Raymond Fulcher**
Applicant

And **The Department of Defence**
Respondent

Tribunal Ms Josephine Lumb (Presiding Member)
Rear Admiral James Goldrick AO CSC RAN (Retd)

Hearing Date 26 March 2020

DECISION

On 14 May 2020 the Tribunal affirmed the decision of the Directorate of Honours and Awards of the Department of Defence to not recommend Mr Raymond Fulcher for the Australian Active Service Medal.

CATCHWORDS

DEFENCE AWARDS – *Australian Active Service Medal – service with Rifle Company Butterworth*

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2)

Defence Regulation 2016 – ss 6, 36

Commonwealth of Australia Gazette No. S 335, Schedule, Australian Active Service Medal Regulations, 2 November 1988

REASONS FOR DECISION

Introduction

1. The applicant, Mr Raymond Fulcher, seeks review of a decision by the Directorate of Honours and Awards of the Department of Defence to not recommend him for the Australian Active Service Medal (AASM).
2. On 28 March 2019 Mr Fulcher contacted the Directorate seeking a full medal assessment for his service in the Citizens Military Forces (CMF) and the Australian Regular Army (ARA) from 11 September 1974 to 23 December 1980.¹ In doing so, Mr Fulcher specified that he was seeking the AASM to recognise his service from 14 February to 23 May 1979 with Rifle Company Butterworth (RCB) stationed at Air Base Butterworth in Malaysia.
3. On 20 May 2019 the Directorate determined that for his service Mr Fulcher was entitled to the Australian Service Medal with Clasp 'SE ASIA' (ASM) and the Australian Defence Medal, and that he did not qualify for any additional awards.²
4. On 4 June 2019 Mr Fulcher applied to the Tribunal for a review of the decision of Defence to deny him the AASM.³ On 12 June 2019 the Tribunal's Acting Executive Officer wrote to Mr Fulcher outlining the Tribunal's jurisdiction and powers and specifying that the matter of recognition of service with the RCB had already been considered by a Tribunal Inquiry, which recommended that no change be made to the medallic entitlements which attach to service with RCB between 1970 and 1989. The letter advised Mr Fulcher that, were the Tribunal to review the Directorate's decision, it would be bound by the eligibility criteria relevant to the AASM, which did not appear to cover his service in Malaysia. The letter also advised Mr Fulcher that, if he were of a contrary view, he could still progress an application to the Tribunal. Mr Fulcher was invited to bring to the Tribunal's attention any new evidence that was not available to it during its earlier considerations of the matter of recognition of the RCB.⁴
5. On 19 June 2019, Mr Fulcher submitted a completed Application for Review of Decision, as required by the Procedural Rules. On 3 July 2019, he provided a memory stick containing extensive archival material and other documentation, together with another application form. A further submission and an application form in the Tribunal's new format were provided on 4 July 2019. An exchange of letters between the Tribunal and Mr Fulcher followed in August 2019 during which it was made clear by Mr Fulcher that he sought that the Tribunal use its power to make a recommendation to the Minister regarding the status of the RCB's service. On 23 August 2019, Mr Fulcher made a further submission to the Tribunal, along with further written submissions over the course of the review.
6. On 23 August 2019, the Chair of the Tribunal wrote to the Secretary of the Department of Defence seeking a report on the reviewable decision. This was provided on 3 October 2019. The Tribunal forwarded a copy of the Defence report to Mr Fulcher on 8 October 2019, seeking his comments. These were provided on 17 October 2019.

¹ Mr Raymond Fulcher Application MOA20190328140RF dated 28 March 2019.

² Directorate of Honours and Awards Letter DHA-425088/8396767 dated 20 May 2019.

³ Mr Raymond Fulcher Application for Review to the Tribunal dated 4 June 2019.

⁴ DHAAT Letter DHAAT/OUT/2019/139 dated 12 June 2019.

Mr Fulcher provided additional material by email on 2 and 23 March 2020, while Defence also submitted newly discovered material on 3 and 23 March 2020, which was made available to Mr Fulcher. The latter provided comment on some of that material by email on 25 March 2020.

7. On 26 March 2020, the Tribunal conducted a hearing by telephone with Mr Fulcher. He was supported by Mr Kenneth Marsh, a former RAAF member who has also been involved in the campaign for recognition of ADF service at Air Base Butterworth. Defence was represented by Ms Jo Callaghan from the Directorate of Honours and Awards and Ms Jackie Cooper, Director Nature of Service. Later the same day, Mr Fulcher provided a copy of his statement made at the hearing, together with a forthcoming article by Mr Marsh on Australia's Five Power Defence Arrangements (FPDA) commitments for the military history journal *Sabretache*. Mr Fulcher provided a corrected version of the article on 27 March 2020. He provided further material, including additional submissions to the Tribunal, on 1, 4 and 7 May 2020.

Mr Fulcher's Service Record

8. Raymond Fulcher enlisted in the CMF on 11 September 1974. He discharged from the CMF on 15 January 1976 and enlisted in the ARA on 16 January 1976. He was honourably discharged from the ARA on 23 December 1980.⁵

9. During his time with the ARA Mr Fulcher had one period of overseas service, at Butterworth Air Force Base, from 14 February to 23 May 1979, with C Company 2/4 RAR.

10. For his service in the CMF and ARA, Mr Fulcher has received the following awards:

- the Australian Service Medal with Clasp 'SE ASIA'; and
- the Australian Defence Medal.

Tribunal Jurisdiction

11. Pursuant to s 110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s 110V(1) and includes a decision made by a person within the Department of Defence or the Minister to refuse to recommend a person for an honour or award in response to an application. Section 6 of the *Defence Regulation 2016* defines a defence award as being those awards set out in Section 36 of the Regulation. Included in the defence awards set out in Section 36 is the AASM.

12. The Directorate's letter of 20 May 2019 conveys a decision in effect refusing to recommend Mr Fulcher for the award he seeks. This is the decision for which he has sought review from the Tribunal.⁶

⁵ Details are from Record of Service - Raymond Fulcher 425088.

⁶ Mr Fulcher Application for Review to the Tribunal dated 4 June 2019.

13. Mr Fulcher's request of 4 June 2019 constituted an application and the Directorate's letter of 20 May 2019 amounted to a refusal to recommend Mr Fulcher for an award as required by s 110V(1) of the Act.

14. Thus, the Tribunal has jurisdiction to review the decision on the AASM. In conducting this review the role of the Tribunal is to determine whether the decision of the Directorate on the AASM is the correct or preferable decision, having regard to the applicable law and the relevant facts.

Tribunal Consideration

Eligibility for AASM

15. The Tribunal carefully considered Mr Fulcher's eligibility against the criteria in the Australian Active Service Medal Regulations.

16. As recognised by the Applicant, a reading of these Regulations makes it clear that an essential precondition for the award of the AASM is *a declaration* of a warlike operation by the Governor-General under regulation 3 to be *a prescribed operation*. If a person's service does not include a prescribed operation that is subject to a declaration by the Governor-General, it is not possible for that person to be awarded the AASM.⁷

17. It is common ground that the Governor-General has not made a declaration under these Regulations for any operation in which Mr Fulcher has been involved. There is therefore no prescribed operation under these Regulations applicable to Mr Fulcher's service. In these circumstances Mr Fulcher is not entitled to the AASM and the Regulations expressly prohibit an award of the AASM to him.⁸

18. The Applicant's evidence and submissions focus on his assertion that service at Air Base Butterworth between 1970 and 1989 amounted to 'warlike' service. For the purposes of the AASM, whether such service was 'warlike' or not is irrelevant to the Tribunal's decision. Even if this service were 'warlike', without a declaration from the Governor-General under Regulation 3, reliance could not be placed on it for award of an AASM.

Further Consideration

19. The question of whether a declaration should be made is one for the Governor-General on the recommendation of the Minister. The Tribunal has the power to make recommendations which it considers appropriate arising out of the review of a reviewable decision.⁹ The Applicant has asked that the Tribunal make a recommendation that the Minister advise the Governor-General that service at Air Base Butterworth for the period in question be declared 'warlike'. Mr Fulcher based this request on what he considers is the new evidence uncovered by his and other persons' research.

⁷ AASM Regulations, paragraph 4(4)(a) and regulation 4(5)

⁸ AASM Regulations, regulation 4(5)

⁹ *Defence Act 1903* – s 110VB(3)

20. Given its recommendation power, the Tribunal therefore examined from afresh the history of the RCB and Air Base Butterworth for the period. The Tribunal acknowledges at this point the extensive research that the Applicant and his colleagues have undertaken. The material provided by him¹⁰ has been carefully examined, along with the other information provided by Defence and through the Tribunal's own research, as well as the material relating to previous occasions when the Tribunal has dealt with matters related to Rifle Company Butterworth. This has included the analysis prepared by the 'RCB Review Group Committee' in 2006¹¹ and the addendum submitted to the Tribunal's inquiry in 2010.¹² Mr Kenneth Marsh's draft article 'Military and Political Risk in South-East Asia 1971-1989' was also extremely useful.¹³

21. The Tribunal notes that one of the key differences between the allocation of Repatriation and Veterans' benefits and the award of medals is that the former must be assessed beneficially while the latter will be based on judgements as to whether the circumstances of the service concerned were either 'warlike', or were 'non-warlike', but still subject to higher levels of hazard than normal peacetime service, or were in fact normal peacetime operations. The separation of the considerations involved is one that has been recognised and repeatedly confirmed. The Tribunal notes that this question was dealt with at length in its predecessor's 2008 Inquiry into the service of 4 RAR in Malaysia in 1966 and 1967.¹⁴

22. Given the potential for confusion, particularly in the use of precedents for decision making, the Tribunal emphasises here that its considerations are solely related to the medallic awards – that is, whether service in the RCB between 1970 and 1989 would be more appropriately recognised by the award of the AASM than the present recognition by means of the ASM with Clasp 'SE ASIA'. Given that the Tribunal's role is confined to medallic recognition, it must be made clear that any recommendation it may make would be restricted solely to that recognition and not to the extension of benefits.

23. While judgements as to awards are inherently subjective because of the differences between one set of operational conditions and another, implicit in them is the maintenance of standards which preserve the integrity of the system of Defence Awards and the distinctions inherent in the different awards of the Active Service Medal and the Service Medal.

¹⁰ See 'Australian Army Deployment to Air Base Butterworth (ABB)' Document Database Index. However, the USB provided by Mr Fulcher includes a number of documents not detailed in the Index, although they had been assigned numbers to fit their place in the chronology employed by the compiler of the Database. Items from the database cited in this judgement are listed with their assigned number.

¹¹ 'Submission Review of Australian Army Company's Military Service as Warlike 1970-1989 Butterworth (RCB)' dated 18 August 2006.

¹² 'RCB Review Group Addendum Submission' provided to Tribunal dated 10 June 2010.

¹³ Kenneth Marsh, 'Military and Political Risk in South-East Asia 1971-1989: Australia's Commitment to the Five Power Defence Arrangements and the Integrated Air Defence System', *Sabretache* (forthcoming).

¹⁴ Defence Honours & Awards Tribunal, *Report of the Inquiry into Recognition for Service Australian Military Personnel Who Served with 4th Battalion Royal Australian Regiment in Malaysia in 1966 to 1967*, February 2009, paragraphs 35-41. This Report's observations in relation to Allotment for Duty (paragraphs 42-55) and 'Warlike' and 'Non-Warlike' service (paragraph 68) are also relevant.

24. Although the Applicant has included such a comparison in the material provided,¹⁵ the Tribunal is struck by the difficulty of making comparisons between one contingency and any other in determining whether they satisfy the designation of ‘warlike’ service. Inconsistencies may well be considered by some to exist between existing awards of the AASM, but such inconsistencies - if they exist - cannot be allowed to justify a ‘race to the bottom’. Each case must be judged on its own merits and in its own context. Due weight must be given to ensuring that any decision neither ignores just claims to such recognition, nor erodes the status of existing awards.

Rifle Company Butterworth

25. The origins of the Australian Army presence at Air Base Butterworth derive from Australia’s security response to the prospective withdrawal of Britain’s military presence from East of Suez. In February 1969, the Prime Minister of Australia made a statement in the House of Representatives which described the arrangements by which Australian forces would remain committed to Malaysia and Singapore. The intended Australian commitment included a warship on station and two fighter squadrons totalling 34 aircraft at Butterworth near Penang in Malaysia, with an additional 8 at a base in Singapore. An infantry battalion would be shifted from an existing base in Malaysia to Singapore. In order to maintain a continuous ground force presence in Malaysia in a form acceptable to the Malaysian Government, it was decided that one infantry company from the Australian battalion in Singapore would be ‘detached on rotation to Butterworth except on occasions when the whole force is training at the Jungle Warfare School or elsewhere in Malaysia.’ The statement made it clear that the company concerned ‘will not be used for the maintenance of internal civil law and order.’¹⁶ The original motive behind the company deployment is reflected in an account provided by the RAAF’s Director General Plans and Policy (Air Commodore, later Air Marshal S.D. Evans) to the Chief of the Air Staff (CAS) in 1973:

‘the decision to base an Australian Army Company at Butterworth was based on a desire to soften the blow of withdrawing the Australian Army Battalion from Malaysia to Singapore. We wanted to appear to have an interest in, and be seen to be doing something in both Malaysia and Singapore and so Sir Henry Bland [then Secretary of the Department of Defence] devised the idea of a Company at Butterworth. The Mirage Detachment at Singapore was based on a similar concept....This was all before any serious consideration of the security situation at Butterworth arose.’¹⁷

¹⁵ ‘Comparison of Operational Service Entitlements and Awards – RCB’ (as at 31 Dec 17) Attachment E to Mr Fulcher Application for Review to Tribunal dated 4 June 2019.

¹⁶ Statement by the Right Honourable John Gorton, MP, Prime Minister of Australia to the House of Representatives 25 February 1969. CPD. (Item 19690225)

¹⁷ RAAF Director General Plans and Policy Minute ‘COSC Agendum 47/1973 – Australian Company at Butterworth’ dated 17 October 1973 (Item 19731017). This officer (AIRCDRE S.D. Evans) later became CAS.

26. The initial rotations to Butterworth from Singapore were one month in length. Although it is clear that the original intention of the Australian Government and acceptance of the scheme by the Malaysian Government were based on the assumption that the formation would be Australian, this was not always the case during the existence of the ANZUK force of which the Australian units were part.¹⁸

27. The decision by the new Labor Government after its election in December 1972 to withdraw the Australian battalion from Singapore forced reconsideration of the remaining commitments. Given the views of the Malaysian and Singaporean Governments, the Australian Government decided to continue the deployment of the RAAF fighter squadrons and their basing in Butterworth and at Tengah, subject to later review. In May 1973, the Director of the Joint Staff proposed that the ANZUK arrangement at Butterworth be replaced by a rifle company deployed from Australia on three monthly rotations.¹⁹ There was no discussion of the role of the formation in the proposal but, significantly, the minute concerned had the subject heading 'Security Butterworth'. In fact, the security role of the company in a contingency at Butterworth had been acknowledged within the Defence Department more than a year earlier.²⁰

28. That protection of the base would be the 'primary task' of the company was explicitly acknowledged by the Chiefs of Staff Committee during their meeting of 28 June 1973.²¹ The deployment became the subject of Australian Joint Service Plan No. 1/1973, designated Plan ASBESTOS. Although the priority role as laid out in this plan was ostensibly training in cooperation with the Malaysian Army, it specifically acknowledged that, 'in addition to training tasks, troops deployed to Butterworth will as in the past, be available if needs be, to assist in the protection of Australian assets, property and personnel, at Air Base Butterworth.'²² A key element of the new arrangements was that operational control of the troops by the Officer Commanding (OC) RAAF Butterworth went from being in contingencies only²³ to continuous within certain limits. The 1973 CAS Directive to the OC spoke of the company's 'continuing responsibility for the protection of Australian operational assets, property and personnel at Butterworth.'²⁴ That OC RAAF Butterworth was of the view that the RCB's primary task was protection of the base was evident in his March 1974 rejection of an inquiry from the Australian High Commission in Kuala Lumpur about the potential for about 100 troops to be deployed for training in Johore, leaving only 32 at Butterworth.²⁵

¹⁸ COMANZUK Signal 'Deployment of Company to Butterworth', 261225Z Nov 71. (Item 19711126)

¹⁹ DJS Minute 121/73 dated 23 May 1973 'Security Butterworth'. (Item 19730523)

²⁰ Marsh 'Political and Military Risk in South-East Asia', citing a 2 March 1972 letter by the Department of Defence on 'Security of Butterworth'.

²¹ COSC Minute 38/1973 Meeting held on 28 June 1973, 'Australian Contribution to the ANZUK Force in Singapore – Command and Control'. (Item 19730703)

²² Australian Joint Service Plan 1/73: Plan ASBESTOS 'Rotation of an Australian Rifle Company to Air Base Butterworth' dated 14 August 1973 amended to AL 1 dated 16 November 1973. (Item 19730814)

²³ CAS Directive to OC RAAF Base Butterworth dated 22 October 1971. (Item 19711027)

²⁴ CAS Directive to OC RAAF Base Butterworth dated 21 August 1973. (Item 19730821) (note that p.2 of the Directive is missing from this copy)

²⁵ OC RAAF Butterworth Letter 3/107(34) 'Australian Army Company at Butterworth' to Defence Adviser Australian High Commission Kuala Lumpur dated 27 March 1974. (Item 19740327)

29. The status of RCB underwent further evolution in July 1974 when the Army accepted that security was the primary tasking, with training secondary. From that point on, two platoons were required to remain at Butterworth at all times, with the third able to train elsewhere in Malaysia but remaining in communication with its Company HQ (and presumably able to return to Butterworth at short notice if required).²⁶

30. The RCB presence has been maintained at Butterworth into the present day, and is currently under the command and control of 2/30 Training Group, itself a direct command of Headquarters 1 Division. However, the period under consideration is considered to have concluded when the Communist insurgent movement, the Malayan Communist Party under the leadership of Chin Peng, signed a peace accord with the Malaysian and Thai governments on 2 December 1989.

Tribunal Conclusions

31. In determining whether a recommendation should be made to the Minister to consider advising the Governor-General that the service in question should be declared ‘warlike’, the Tribunal came to a number of conclusions.

32. The Tribunal notes that service with RCB and by other ADF personnel at Air Base Butterworth between 1970 and 1989 has been recognised by the award of the ASM with Clasp ‘SE ASIA’. The existence of this award is integral to the Tribunal’s considerations because it means that such service has already been recognised as ‘hazardous’ and was therefore not rendered under ordinary peacetime conditions.

33. The Tribunal notes that the Applicant has devoted considerable effort to arguing that the Commonwealth has failed to accept legal principles behind the ‘incurred danger’ test when considering the nature of the RCB’s service. The Tribunal makes no comment about the legitimacy of this argument in relation to the potential Repatriation or Veterans’ benefits available to the RCB. To cite an inquiry report by the Tribunal’s predecessor,

‘Various courts have ruled that no attempt is made to indicate how much, how close, how long or how intense the incurred danger must be before it meets the requirements of the legislation or relevant policy.’²⁷

34. The point at issue in this application, however, is not whether ‘incurred danger’ existed for the RCB between 1970 and 1989. The award of the ASM to its members confirms that the ‘hazardous’ nature of the operation has been recognised by the Commonwealth. The question for the Tribunal is rather whether the circumstances justify the different award of the AASM.

²⁶ SRGD (AF) Note of Action, ‘ARA Infantry Coy at But’ dated 11 October 1974. (Item 19741011)

²⁷ Defence Honours & Awards Tribunal, *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, December 2009, paragraph 81.

RCB and RAAF/ADF Service at Air Base Butterworth

35. Firstly, the Tribunal formed the view that the situation of the Rifle Company Butterworth cannot be considered separately from RAAF or other ADF personnel located at Air Base Butterworth who would have been expected to contribute to the defence of the facility in a contingency – and/or who were also at whatever risk of attack existed at the time. This is especially true before 1973 when the relationship of the Army unit to the Air Force organisation was still evolving. Air Base Butterworth OPORDER 1/71 of 8 September 1971, for example, sets out the requirement for the various RAAF and Royal Malaysian Air Force (RMAF) units on the base to activate Ground Defence Flights in a contingency. Notably, because of the possibility that the Army Company might be away from the base, it is not assigned responsibility for any of the Vital Points listed in Appendix 2 to Annex C to the OPORDER.²⁸

36. In later years, the evidence available to the Tribunal confirms that RAAF personnel continued to have responsibilities for security even after the deployed Army company was integrated into the arrangements to protect the Air Base.²⁹ Indeed, the documents in the material provided by the Applicant are generally consistent in their recognition that a single company could not provide for the defence of the entire facility and that the RAAF units at Butterworth would need to provide guards and control personnel as well – and in large numbers in during higher security states, independent of RCB and of the potential contribution by Malaysian units.

37. Thus, if the Tribunal were to make a recommendation for a new declaration, that declaration would need to include the RAAF and other ADF personnel who served at the Air Base during the period in question and not only those who served in the Australian Rifle Company Butterworth. The Tribunal understands from the Applicant's response to questions put to him at the hearing that he accepts this position.

Operational Status of RCB

38. The Tribunal recognises that the deployment of the infantry company after 1973 was fundamentally an operational one, in order that the unit could be 'available if needs be, to assist in the protection of Australian assets, property and personnel, at Air Base Butterworth'.³⁰ The final role of the company was probably best summed up in a 1977 paper 'RAAF Presence at Butterworth' which stated that it was 'to enhance the security of the RAAF deployment'³¹ – but it did not replace the RAAF or Malaysian Armed Forces completely in the security task, while security was not its only mission.

²⁸ Air Base Butterworth OPORDER 1/71 dated 8 September 1971. Annexes A to F. (Item 19710908B)

²⁹ SRGD AF Minute 'Butterworth Brief for Ministerial Visit Dec 74' dated 3 December 1974. (Item 19741203)

³⁰ Australian Joint Service Plan 1/73: Plan ASBESTOS 'Rotation of an Australian Rifle Company to Air Base Butterworth dated 14 August 1973 amended to AL 1 dated 16 November 1973. (Item 19730814)

³¹ Secretary Department of Defence letter to Secretary Prime Minister & Cabinet dated 9 May 1977 covering SIP Division Brief 'The RAAF Presence at Butterworth' DEF 270/1/4 dated 5 November 1976 – see paragraph 2. (Item 19770509)

39. The Tribunal acknowledges that the publicly enunciated purpose ‘of providing an opportunity for further training and developing cooperation with the Malaysian forces and the elements of the RAAF at Butterworth’³² which was a convenient label for both the Australian and the Malaysian governments of the day may have created confusion as to the status of the company in later years, even within the Department of Defence itself. The Tribunal notes, however, that while the deployment from 1973 had security as a primary task, there is evidence that the Australian Army was still interested in training opportunities in Malaysia, both in their own right and to improve cooperation with the Malaysian Army,³³ not just as ‘cover’ for the main purpose. The Australian High Commission in Kuala Lumpur clearly went to considerable lengths to develop training arrangements with the Malaysian Army.³⁴ There is also evidence that not all RAAF authorities accepted even in 1973 that the RCB’s primary task was security – or that the RCB was necessarily more effective than would be the provision of additional RAAF airfield defence personnel.³⁵

40. The informal unit accounts of deployments in the late 1970s and 1980s confirm that, although the security task was never neglected, the time in Malaysia represented an important and welcome opportunity for training, as well as an overseas and culturally broadening experience for soldiers with few other such professional opportunities.³⁶ As the 1980s went on, the time spent on exercise with an increasingly capable and less operationally stressed Malaysian Army increased.³⁷

Operational Circumstances faced by RCB

41. All this, it is accepted, was never at the expense of the security commitment. However, although the Tribunal acknowledges the fundamentally operational nature of the deployments, operational service does not of itself necessarily equate to ‘warlike’ service for medallic recognition. The Tribunal carefully assessed the arguments put by the applicant in order to determine whether there is justification for proposing a change in the present recognition of the RCB’s service.

³² AHQ Staff Instruction No. 19: ‘Rotation of Australian Rifle Company at Air Base Butterworth’ dated 14 August 1973. (Item 19730814B)

³³ See COSC Agendum 47/73 Supp 1, Minute No. 67/1973 Revise, Minute of Meeting held on 17 October 1973. (Item 19731024)

³⁴ Services Adviser, Australian High Commission Kuala Lumpur letter 207/5/14 ‘Australian Company at Butterworth’ to Secretary Department of Defence dated 4 October 1973. (Item 19731004)

³⁵ Particularly significant are RAAF Director General Plans and Policy Minutes ‘COSC Agendum 47/1973 – Australian Company at Butterworth’ dated 16 October 1973. (Item 19731016A) and 17 October 1973 (Item 19731017).

³⁶ Major R. Chandler, ‘C Coy 2/4 RAR Tour of Air Base Butterworth 14 Feb. – 23 May 1979. (Item 19790523); Lt Tom Uil, ‘Support Company in Malaysia: The Butterworth Detachment’ magazine article describing March-June 1980 deployment of Support Company 1RAR. (Item 19800224)

³⁷ ‘Butterworth – A Company’ 2/4 RAR Magazine article describing November 1984-March 1985 deployment of A Company. Note the mention of each platoon undertaking two weeks’ training at the Malaysian Army Combat Training School at Pulada, near Singapore. (4 days were actually spent in Singapore itself.) (Item 19850306) See also Captain Jim Dittmar & Major John Petrie, ‘Australian Rifle Company Butterworth’ article in *Duty First: Official Journal of the Royal Australian Regiment Association* Summer 1983 describing A Company 1RAR’s recent deployment to RCB. Notably, A Company spent 2 weeks in jungle training with 7 Royal Malay Regiment before beginning duties at Butterworth. (Item 19830131)

42. In the current state, in accordance with the 2007 decision of the Minister for Veterans' Affairs, ADF service at Butterworth Air Base between 1970 and 1989 is considered as 'hazardous' in relation to Section 120 of the *Veterans' Entitlements Act* and that, '...award of the Australian Service Medal will also apply to those who served at the Butterworth Air Base during the period in question.'³⁸

43. The Tribunal notes that many threat assessments suggest that Australian forces would not be the primary target of the insurgents, but rather might suffer collateral harm, given the lack of discrimination inherent in the potential methods of attack.³⁹ The Tribunal also noted mention on occasion of the potential for 'blue on blue' engagements with the Malaysian forces charged with security of the Air Base and the implication that these were considered a greater and more likely hazard than insurgent activity.⁴⁰

44. The Tribunal recognises that there was 'increased concern' about security in the early 1970s and that this influenced the changes in the employment of the company deployed to Butterworth.⁴¹ It notes in particular the concerns about an increased threat expressed by Australian authorities in 1975,⁴² associated with events in Vietnam and the acquisition of improved weaponry, such as rockets and mortars, by the insurgents.⁴³ There was certainly evidence of intrusions and possible minor sabotage events at Butterworth in the same period, although some activities could have had theft as the motive.⁴⁴ That any rocket or mortar attacks on Butterworth were actually attempted is not apparent in contemporary documents, although there have since been claims that evidence of such activities was discovered in the vicinity of the air base.⁴⁵

45. It must be pointed out, however, that the fears expressed by RAAF Commanders and other authorities appear to have derived principally from the potential *consequences* of any attack, which were viewed as being severe, both in direct effects (civilian and military personnel casualties, damage to aircraft or facilities) and in the wider strategic

³⁸ The Honourable Bruce Bilson, Minister for Veterans' Affairs, letter to Mr Robert Cross, Chairman RCB Review Group, dated 4 October 2007.

³⁹ See for example Paragraph 45, 'The Security of Air Base Butterworth' JIO Study No. 13/75 Issued Oct 75. (Item 19751001); and SIP Division Brief 'The RAAF Presence at Butterworth' DEF 270/1/4 dated 5 November 1976. (Item 19761105)

⁴⁰ Note paragraphs 11 & 12 of 'End of Tour Report by B Coy 1 RAR 9 Dec 81- 17 Feb 82' dated 16 February 1982. (Item 19820216)

⁴¹ Defence Planning Division Brief 'VCGS Visit to Malaysia: The Butterworth Company' dated 11 October 1973. (Item 19731011)

⁴² HQ Butterworth to DEFAIR Canberra Signal A4I (for DCAS from OC Base Security). DTG not known but dated 2 April 1975. (Item 19750402B)

⁴³ CAS to Minister for Defence 'Security of Butterworth' Minute 554/9/33(87) of 7 April 1975 and supporting material, including DCAS to DJS Minute 'Butterworth Security' 564/8/28 of 14 October 1975. (Item 19751007)

⁴⁴ HQ Butterworth Signal A140 'Sitrep Butterworth and North Peninsular Malaysia 050730Z AUG 75. (Item 19750805).

⁴⁵ Group Captain John McCoombe RAAF (ret) to Lieutenant Colonel (ret) Russell Linwood email dated 3 May 2020. LtCol Linwood's original article is on page 20 of the first 2020 edition of the Defence Force Welfare Association's *Camaraderie* magazine:

<https://dfwa.org.au/sites/default/files/Camaraderie%20Vol%2051%2C%20No%201%20LR.pdf>

consequences for Australia.⁴⁶ Thus, even a small increase in the likelihood of such an event could not pass without a response, even if that likelihood remained relatively low. This is wholly in line with normal military contingency planning – and with any civil concept of risk management. It must be emphasised that taking precautions against the possibility of extreme events does not of itself amount to the ‘expectation’ of such events but rather is a prudent response to the *possibility* that they might occur. Specifically, in this situation, the ‘expectation’ of casualties that is one of the key criteria for ‘warlike’ service.

46. Although they have no legal status and were not originally directed to the recognition of service by the award of medals, the definitions of ‘warlike’ and ‘non-warlike’ service developed in 1993 provided by Defence to the 2009 Inquiry into 4 RAR service and also used in the 2010 Inquiry into RCB service are relevant, particularly as they were in use when award of the ASM with ‘SE ASIA’ clasp was extended to those who served at Butterworth between 1970 and 1989. That for ‘non-warlike’ service was:

‘...those military activities short of war-like operations where there is risk associated with the assigned task(s) and where the application of force is limited to self-defence. *Casualties could occur but are not expected.* [Italics supplied by the Tribunal]’⁴⁷

47. Slightly revised definitions were approved by the Minister for Defence in 2018 and are now in use by Defence. That for ‘non-warlike’ service is:

Non-warlike service exposes ADF personnel to an indirect risk of *harm* from *hostile forces*.

A *non-warlike* operation is an Australian Government authorised military operation which exposes ADF personnel to the risk of *harm* from designated forces or groups that have been assessed by Defence as having the capability to employ violence to achieve their objectives, but there is no specific threat or assessed intent to target ADF personnel. The use of force by ADF personnel is limited to self-defence and there is no expectation of ADF casualties as a result of engagement of those designated forces or groups.⁴⁸

48. The Applicant has placed emphasis on the fact that the Rules of Engagement (ROE) of the RCB went further than pure self-defence, notably in their allowing the use of lethal force against intruders in designated Protected Places, as permitted by Malaysian

⁴⁶ FAS SIP to DJS Minute ‘RAAF Mirage Squadron at Butterworth’ D58/4/1 dated 27 May 1975. (Item 19750527)

⁴⁷ ‘Types of ADF Deployments Overseas – Definitions’. (Item 20150101D) See also Defence Honours & Awards Tribunal, *Report of the Inquiry into Recognition for Service Australian Military Personnel Who Served with 4th Battalion Royal Australian Regiment in Malaysia in 1966 to 1967*, February 2009, paragraph 68.

⁴⁸ Department of Defence, ‘Definitions for the Nature of Service Classification, Peacetime, Non-Warlike and Warlike’ As approved by Minister for Defence 27 February 2018.

Emergency Regulations. The Tribunal, however, was struck by the emphasis on restraint that is apparent even in the earliest years of the deployments. Annex A to Air Base Butterworth OORDER No. 1/71 lays out the legal situation about the use of force in some detail. While it recognises the special provisions for ‘Protected Places and Protected Areas’ under the Malayan Ordinance of 1959, the focus on the minimum use of force is clear. Appendix 5 to Annex C includes sentry instructions and specifically tempers the guidance for Protected Place protection with ‘If the person still fails to halt, or stop his efforts to enter the Protected Place, you will, *using as little force as necessary* [italics supplied], but including firing as a last resort, force him to halt and hold him covered with your weapon until help arrives.’⁴⁹

49. This approach is clearly sustained in the mid-and late 1970s; indeed the term ‘protection’ for the role of the Company seems to have been standard. Notably, the direction that the use of lethal force must be considered an absolute last resort is capitalised in the ROE and in a prominent place in the instructions.⁵⁰ There was an additional good reason for this attitude, the desire to avoid mistaking Australian or Malaysian military or civilian personnel for intruders. Appendix 3 to Annex C in the Unit Standing Orders for RCB dated 12 December 1978 is clear:

‘All troops are to be made aware, through briefing and discussions, of the difficulties of and necessity for, identifying friend from foe. Most Malaysians who have access to the Air Base, seldom carry identity cards and probably have only a vague awareness of authorized and unauthorized areas....The most important implication of engagement by fire is ‘IF IN DOUBT DO NOT SHOOT.’’⁵¹

50. The Rules of Engagement used in 1982 are similarly worded.⁵² That accidents could have easily happened was acknowledged at the Tribunal hearing by the Applicant in recounting his personal experience of guarding a C130 aircraft loaded with small arms and ammunition in 1979. He explained that only his restraint prevented him shooting an RAAF member who had ignored the appropriate procedures when approaching the aircraft.⁵³ The recollections of then Corporal Mark Butler in relation to dealing with a possible intruder in 1977-78 include the comment that his Company Second in Command had made it clear to him, ‘that if anything happened he didn’t want indiscriminant [sic] shooting to occur’, at least in part because of the close presence of a Malay settlement.⁵⁴

51. The Tribunal thus could not form the view that the situation which the ROE were designed to meet could be considered ‘warlike.’ Rather, the ROE covered a situation which can be described as one of ‘extended self-defence’ – protection was to be provided to

⁴⁹ Air Base Butterworth OORDER 1/71 dated 8 September 1971. Annexes A to F. (Item 19710908B)

⁵⁰ ‘Rules of Engagement’, Annex A to HQ Field Force Command 722-K11-11 dated Jul 78. (Item 19780701)

⁵¹ Unit Standing Orders Australian Rifle Company Air Base Butterworth Malaysia, revised 12 December 1978. (Items 19781212 & 19781212A)

⁵² ‘Rules of Engagement’ Annex A to HQ FF COMD STAFF INSTR 3/82 dated 13 May 1982. (Item 19820513)

⁵³ Mr Raymond Fulcher personal recollection of service in RCB with C Company 2/4 RAR in 1979. Hearing dated 26 March 2020.

⁵⁴ Statutory Declaration by Mark Anthony Butler dated 7 May 2019.

Australian military assets, people (both Australian military and civilian) and property, but there was no remit to seek out and engage potential adversaries who did not constitute an immediate threat. The definition of ‘hazardous operations’ provided by Defence in 2009 is relevant:

‘Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty such as mine avoidance and clearance, weapons inspections and destruction, Defence Force Aid to the Civil Authority, Service protected or assisted evacuations and other operations *requiring the application of minimum force to effect the protection of personnel or property* [Italics applied by the Tribunal], or other like activities.’⁵⁵

52. The Tribunal also notes the continuing operational restraints on the deployment of troops outside the airfield boundary - the exception being if local Australian dependents required protection in a contingency - and the care with which Malaysian and Australian authorities tried to ensure that any Australian exercise activity would not stumble across insurgents.⁵⁶ The Tribunal notes the statutory declaration of a soldier in a 1979 exercise in which contact with Communist insurgents is claimed to have been made but the Australian soldiers were immediately withdrawn ‘without firing a shot’ to leave the area to be cleared by Malaysian troops.⁵⁷ It is aware of other claims of encounters or near-encounters during field training (and, allegedly, even during a ‘Hash House Harriers’ run⁵⁸) in other years, but these similarly showed clear and consistent intent to avoid engagements with the insurgents, leaving them to be dealt with by Malaysian security forces. The Tribunal also formed the impression from these reported incidents that, for their part, the insurgents displayed no appetite for encounters with Australian forces.

53. The Tribunal accepts that Malaysian authorities consider there was an armed conflict between Malaysia and the Communist insurgents between 1968 and 1989 and that this meant that the Malaysian Armed Forces personnel were on ‘active service’ when involved in the operations concerned.⁵⁹ The Tribunal also recognises that there was a ‘Second Emergency’ in Malaysia, although the declaration of a new State of Emergency in May 1969 had its direct origins in the race riots that occurred in Kuala Lumpur that month, rather than the Communist insurgency itself. It is clear that the Malaysian Armed Forces suffered continuing, sometimes heavy casualties as a result of insurgent action.⁶⁰

⁵⁵ Defence Honours & Awards Tribunal, *Report of the Inquiry into Recognition for Service Australian Military Personnel Who Served with 4th Battalion Royal Australian Regiment in Malaysia in 1966 to 1967*, February 2009, Paragraph 68). ‘Types of ADF Deployments Overseas – Definitions’ has slightly different wording but is in effect the same. (Item 20150101D)

⁵⁶ Services Adviser, Australian High Commission Kuala Lumpur letter to Secretary Department of Defence 207/5/2 dated 18 September 1973. (Item 19730918) Note also: Director of Plans, Directorate of Joint Plans, Malaysian Ministry of Defence letter ‘Clearance/Training Facilities for Australian Coy’ KP/RAN 5/5019/4/1 dated 8 October 1973. (Item 19731008)

⁵⁷ Statutory Declaration by Mark Terry Stewart dated 18 August 2016. (Item 19781001).

⁵⁸ Testimonial statement by Geoff Trowbridge (WGCDR RAAF Ret), ‘Experience in Northern Malaysia while on Operations against Communist Terrorists 1976 to 1979’ undated but submitted to DVA in 2013.

⁵⁹ Federal Counsel, Office of the Chief Secretary, Ministry of Defence Malaysia letter ‘Information on the status of service of the Malaysian Armed Forces from 1970 to 1989’ KP/UNDG/333 dated 11 October 2004. (Item 20031011)

⁶⁰ Army Headquarters, *The Malaysian Army’s Battle against Communist Insurgency in Peninsular Malaysia 1968-1989*, Ministry of Defence, Kuala Lumpur, 2001. (Item 20010101C)

However, despite whatever ‘indirect’ support that the Australian government may have been willing to provide⁶¹ – even up to the level of covert air reconnaissance,⁶² unlike the original Malayan Emergency there was no question of the direct involvement of Australian ground forces. Nor would the Malaysian government have welcomed it. Australian involvement in the conflict was thus peripheral, even if sometimes traumatic for the individual, as in the Applicant’s account at the hearing of witnessing Malaysian soldiers’ bodies being brought back to Butterworth in RMAF helicopters, which afterwards had to be washed clean of blood.⁶³

54. The Tribunal thus does not accept that a ‘state of war’ extended to the Australian situation, despite the challenges and ambiguities inherent in the ADF presence at Butterworth between 1970 and 1989. It is of the view that the conditions there fit the 2009 description of ‘hazardous’ and ‘non-warlike’, as well as the 2018 definition of ‘non-warlike’ and were thus more than normal peacetime service, but do not satisfy the definition of ‘warlike’ in relation to medallic recognition.

55. The Tribunal is of the view that the ASM with ‘SE ASIA’ clasp is appropriate recognition for the service of RCB, RAAF and other ADF personnel at Air Base Butterworth during a period in which the Australian presence provided an important contribution to the stability of Malaysia and Singapore when those nations faced many challenges in a developing, but uncertain strategic environment. The medal and clasp should be worn with pride, particularly by those members who contributed directly to the security of the base and the continuing safety of Australian civilian and military personnel.

Tribunal Finding

56. For the reasons given above, the Tribunal finds that Mr Raymond Fulcher is not eligible for the AASM. His service at RAAF Butterworth has not been subject of a declaration by the Governor-General under the relevant regulations. Consequently he did not render service in a prescribed operation entitling him to this award.

57. Having carefully considered the evidence before it in this matter, including that provided by Mr Fulcher, the Tribunal is of the view that the current medallic recognition of RCB service for the period 1970 to 1989 by the ASM with Clasp ‘SE ASIA’ is appropriate. It therefore will not make a recommendation for a change.

⁶¹ See paragraph 3, CAS Directive to OC RAAF Base Butterworth dated 2 October 1970. (Item 19701002)

⁶² High Commissioner for Australia in Kuala Lumpur to Secretary, Department of Foreign Affairs & Secretary, Department of Defence letter ‘Malaysian Request for RAAF Photographic Reconnaissance’ 225/38/1 dated 21 July 1971. (Item 19710721)

⁶³ Mr Raymond Fulcher personal recollection of service in RCB with C Company 2/4 RAR in 1979. Hearing dated 26 March 2020.