SUBMISSION 057b

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Submission to Inquiry - Mr Kenneth Neville Marsh

Part 1 – Name of Inquiry

Name of Inquiry *

Inquiry into Medallic Recognition for Service with Rifle Company Butterworth

Part 2 – About the Submitter

Title or Rank *

Mr
Surname *

Marsh
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Secondary Contact Number

Is the Submission on behalf of an organisation? If yes, please provide details:

Part 3 – Desired outcome

Provide a summary of your submission:

AASM for Butterworth Service 1968-1989 This brief submission is in response the submission made by the Department of Defence in July 2022. As agreed to by Justices Mohr and Clarke in their reviews of 2000 and 2003, the one, objective, test to determine eligibility for the AASM is the incurred danger test. Both reviews determined this test must be made on the facts as they were known at the time, stating that retrospective assessments were illegitimate. Despite their knowledge of these reports Defence fail to address this one point, preferring to rely on selective documents and retrospective arguments in what can only be seen as an attempt to mislead. This submission humbly requests that the decision of the Tribunal be based on the objective facts that confirm the presence of an armed enemy and the fact that troops were warned of this enemy. As Clarke said, if the military authorities sent troops to a place vulnerable to attack, they were sent into harm's way.

Part 4 - Your submission and Supporting Documentation

File Attached: 20220812-Response-to-Defence-Submission.-combined.pdf

Part 5 – Consent and declaration

✓ I consent to the Defence Honours and Awards Appeals Tribunal making my submission publicly available.

✓ I also consent to the Defence Honours and Awards Appeals Tribunal:

- using information contained in my submission to conduct research;
- providing a copy of my submission to a person or organisation considered by the Tribunal to be appropriate; and
- providing a copy of my submission to a person or organisation the subject of adverse comment in the submission;
- using content in my submission in its report to Government.

The Tribunal will decide which person or organisation is appropriate, and this may include:

1. persons or organisations required to assist with the inquiry; and
2. persons or organisations with an interest in the inquiry.

✓ I declare that the information I have provided is correct.

Name

Kenneth Neville Marsh
Date

12/08/2022 /

Mr Kenneth Neville Marsh

Signed by Mr Kenneth Neville Marsh
Signed on: 12 August, 2022

Signature Certificate

Document name: Submission to Inquiry - Mr Kenneth Neville …

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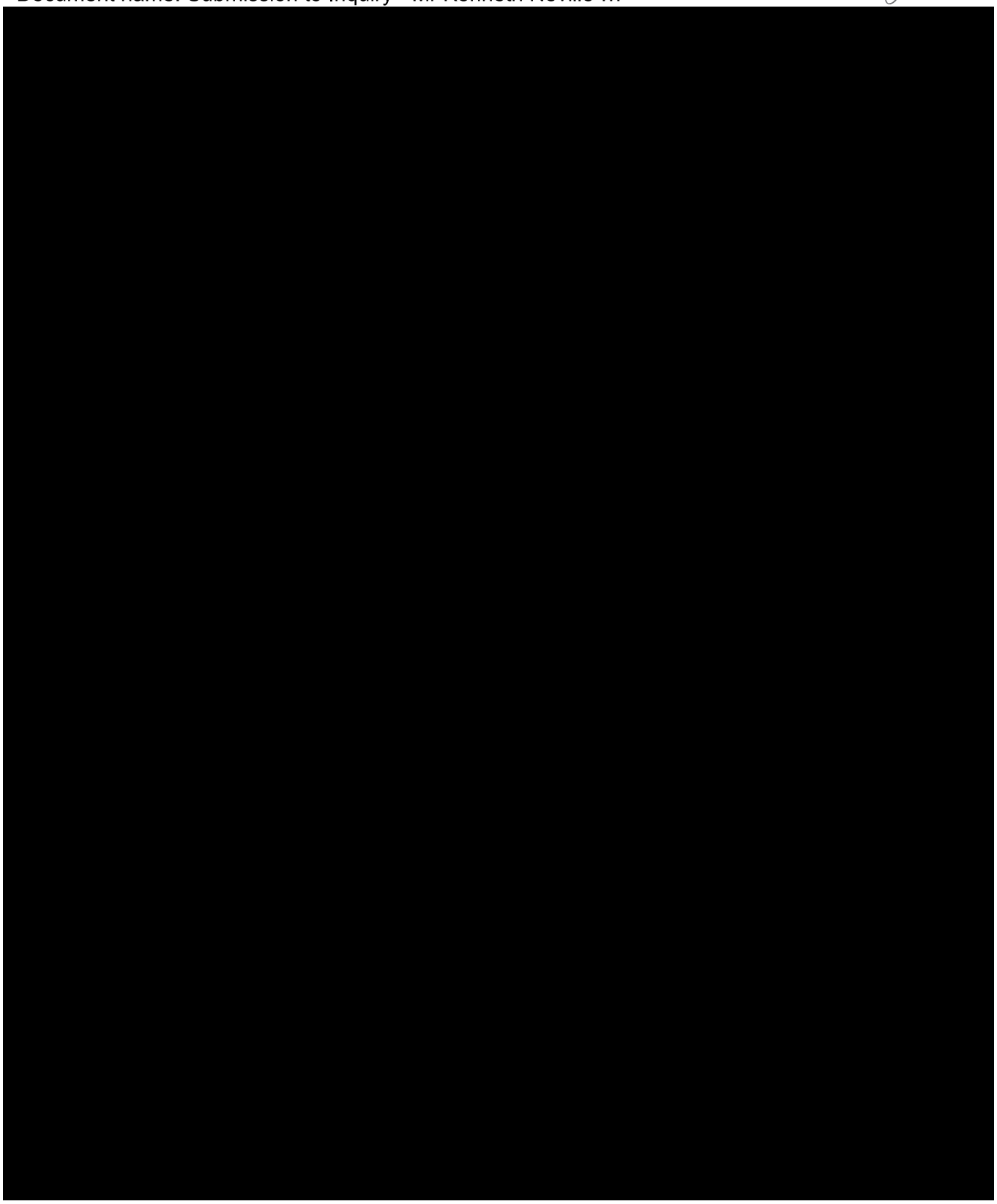

Response to the Department of Defence's Submission to the Defence Honours and Awards Tribunal, Inquiry into Medallic Recognition for Service with Rifle Company Butterworth, July 2022

Both Justice Mohr, in his "Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75" (chapter 2) and Justice Clarke in his "Review of Veteran's Entitlements" (chapter 11.57) understood the statutory eligibility for qualifying, or active, service to be established when "a veteran … 'incurred danger from hostile forces of an enemy'".

Both agreed this was an objective test. In short, Mohr concluded the test was satisfied if an armed enemy was shown to be present, or if the troops were told they would be in danger from the enemy. Clarke concluded that if the military authorities sent troops to a place vulnerable to attack, they were sent into harm's way.

Importantly, both clearly understood decisions regarding nature of service determinations must be made on the facts as they were known at the time, not with the benefit of hindsight. Whether or not that place came under attack is immaterial.

Evidence presented in various submissions to the Tribunal clearly show that an enemy was known to be present and that troops were told this.

The Department of Defence's submission fails to address this clear principle underlying Australia's repatriation and medallic system.

Both the Mohr and Clarke reviews were commissioned by and accepted by the Government of the day. Therefore, their determinations must be seen as authoritative. That Defence, in its submission, reference both reviews without acknowledging the basic principles determined by Mohr and Clarke must call into question the integrity of their submission.

I have attached the relevant sections from both reviews. Note the page numbering in the Mohr Attachment differs to that cited by Clark.

Kenneth Marsh, 12/08/2022

steps to ensure that the required allotment procedures were attended to when quite clearly they should have been.

There is a procedure available for retrospective allotment but this appears not to have been followed in many cases.

It seems unfair that members of the ADF in this situation should be denied the opportunity to put forward for consideration the nature of their service, which would in many cases, amount to operational and/or qualifying service because of this action, or rather lack of action, of their superiors.

I make this general comment in the light of the invitation in your letter of 05 Oct 99, suggesting that my recommendations may be of general interest to the veteran community.

In other parts of my Report I have commented on the considerable confusion in the minds of recipients of the value of the award of an Australian Active Service Medal (AASM), the very nature of which demonstrates to their mind that they must have had service which would amount to 'qualifying service', in relation to repatriation entitlements.

It does not I think fall within the general ambit of the Review to resolve these matters, although you will be aware that in particular cases I have advised that some remedial action should be taken.

'INCURRED DANGER', 'PERCEIVED DANGER' AND 'OBJECTIVE DANGER'

In essence, Section 7A of the VEA 1986 requires that a veteran must have 'incurred danger from hostile forces of an enemy' before such service becomes 'qualifying service' for the 'service pension'.

In ***Repatriation Commission v Thompson***, the Full Federal Court decision carried the matter a step further in stating that a 'perceived danger' had to be contemporaneous with an 'objective danger'.

The judgement in that case was clearly correct in defining the distinction between 'perceived' and 'objective' danger on the facts proved in that case. Although *Thompson* genuinely 'perceived' danger, on a review of the facts no danger of any sort existed. The facts clearly showed that no hostile forces capable of being a danger to him were within hundreds of kilometres of the incident in which he 'perceived' danger. In that case, there was plainly no 'objective danger'.

In other words the danger he 'perceived' arose from his own fear that he was in danger, but this fear was a delusion in his mind. A serviceman incurs danger when he encounters danger, is in danger or is endangered. A serviceman incurs danger from hostile forces when he is at risk or in peril of

harm from hostile forces. A serviceman does not incur danger by merely perceiving or fearing that he may be in danger.

Although the outcome in the *Thompson* case is clear on the facts provided, it still leaves open the question of how an 'objective danger' is to be established.

To establish whether or not an 'objective danger' existed at any given time, it is necessary to examine the facts as they existed at the time the danger was faced. Sometimes this will be a relatively simple question of fact. For example, where an armed enemy will be clearly proved to have been present. However, the matter cannot rest there.

On the assumption that we are dealing with rational people in a disciplined armed service (ie. both the person perceiving danger and those in authority at the time), then if a serviceman is told there is an enemy and that he will be in danger, then that member will not only perceive danger, but to him or her it will be an objective danger on rational and reasonable grounds. If called upon, the member will face that objective danger. The member's experience of the objective danger at the time will not be removed by 'hindsight' showing that no actual enemy operations eventuated.

All of the foregoing highlights the inherent difficulty with this concept of perceived and objective danger. It seems to me that proving that danger has been incurred is a matter to be undertaken irrespective of whether or not the danger is perceived at the time of the incident under consideration. The question must always be, did an objective danger exist? That question must be determined as an objective fact, existing at the relevant time, bearing in mind both the real state of affairs on the ground, and on the warnings given by those in authority when the task was assigned to the persons involved.

During discussion at the Public Hearing in Canberra with representatives of the Departments of Defence and Veterans' Affairs, it appeared that in deciding the question of whether or not an objective danger existed at any given time, the issue turned on the question of whether or not the service was 'warlike' or 'non warlike' in nature. It was agreed that there might well be 'grey' areas that do not fall clearly on one side of the line or another. Similarly, there may be circumstances in which perhaps, for a short period, a 'non warlike' operation can become very 'warlike'.

It would seem that there is no difficulty when deployments are declared, prospectively, to be 'warlike'. In that case all those who subsequently served in the prescribed area would be covered by the 'warlike' declaration irrespective of the actual nature of the duties carried out by the personnel of the Service or Services involved. However, even in this case the authorities would know that some personnel within the deployment would not, on examination, incur danger from hostile forces of the enemy and therefore, technically, would not have 'qualifying service' for the service pension. Yet all personnel who form part of the deployment are covered automatically by the prospective declaration that service is 'warlike'.

This outcome is not new. I understand that in the two world wars, involvement was such that in principle, 'qualifying service' for the service pension was not solely related to those in combat service. It had to include a measure of general service which was not service in direct combat, but which was continuous, subject to general service conditions and in respect of which, no satisfactory line of demarcation could be fixed to divide it from combat service.

With respect, I believe that a similar set of circumstances to the world wars and in the current 'warlike' classification existed in those areas now under review and where anomalies are alleged to have occurred. With the prospective declaration of 'warlike', it is inevitable that some personnel would have qualifying service for fairly remote participation, and there may not have been any likelihood of their incurring danger from hostile forces of the enemy given the nature of their support services. Within those ADF deployments, there were areas of direct participation in fighting, areas of service involving operational risks but not involved in fighting, and areas of service in support of those undertaking operations.

It is understandable that these variations of service within an operational area can not be entirely avoided when decisions are taken, prospectively, to declare service as 'non warlike' or 'warlike'. Given this uncertainty, it seems to me then to be quite indefensible to require later on more demanding criteria to be met when examining the nature of service not covered by the original declaration process. This is especially so when this latter service was conducted in the same period and in the same operational area and equates more than favourably with that of most personnel or units covered by the prospective declarations.

I believe that in making retrospective examinations on the nature of service many years after the event, as is now the case, the concepts and principles involved should be applied with an open mind to the interests of fairness and equity, especially if written historical material is unavailable for examination or is not clear on the facts. This is the approach that I have taken in addressing the anomalies put forward and to me, it accords with the general Defence classification principles and the benevolent nature of the Veterans' Entitlements Act, and the general principles promoted therein.

The foregoing remarks are made to point out the many shades of grey and difficulties that arise from the concepts of 'incurred danger', 'perceived danger' and 'objective danger' and in the application of these concepts when considering the nature of service of past overseas deployments of ADF personnel.

> regard it as possibly imminent at any moment — that, in my opinion, is the situation connoted by the word 'danger'…
>
> I am of the opinion that having proved a risk possible the onus would NOT lie on the claimant to prove that at a particular time the enemy was in a position to inflict injury, so that the risk was in that sense probable. If in a particular area, say the Indian Ocean, it was proved that 'Emden' was destroyed it would not be necessary to show that there were other raiders about. To put it another way, the claimant would not be defeated because knowledge obtained later showed that the enemy has [sic] no more raiders.
>
> I am therefore of the opinion that a claimant is entitled … if he can prove that he was on service in some place on sea or land where injury from hostile action was conceivable and might reasonably have been regarded as an existing risk, and this is irrespective of proof whether the enemy at that particular time was or was not capable of inflicting injury at that spot.

11.56 Having regard to the context (that is, the risk of harm during war), and the undoubted beneficial nature of the legislation, it is the Committee's opinion that Windeyer's view, in particular, reflects more closely the statutory test, than does the approach evident in AAT decisions.

11.57 The problems in the application of the statutory test were clearly brought out in the Mohr Report (Mohr 2000, pp. 2–4), which stated:

> To establish whether or not 'objective danger' existed at any given time, it is necessary to examine the facts as they existed at the time the danger was faced. Sometimes this will be a relatively simple question of fact. For example, where an armed enemy will be clearly proved to have been present. However, the matter cannot rest there.
>
> On the assumption that we are dealing with rational people in a disciplined armed service (i.e. both the person perceiving danger and those in authority at the time), then if a Serviceman is told there is an enemy and he will be in danger, then that member will not only perceive danger, but to him or her it will be an objective danger on rational or reasonable grounds. If called upon, the member will face that objective danger. The member's experience of the objective danger at the time will not be removed by 'hindsight' showing that no actual enemy operations eventuated.
>
> All of the foregoing highlights the inherent difficulty with this concept of perceived and objective danger. It seems to me that proving that danger has been incurred is a matter to be undertaken irrespective of whether or not danger is perceived at the time of the incident under consideration. The question must always be, did an objective danger exist? That question must be determined as an objective fact, existing at the relevant time, bearing in mind both the real state of affairs on the ground and the warnings given by those in authority when the task was assigned to the persons involved.

11.58 In this passage, two important and interrelated points are made. The first is that the concept of an objective danger is a complex one and that the difficulties are compounded by the suggestion in *Repatriation Commission v. Thompson* that the claimant's perception of danger was not enough to satisfy the test.

11.59 Because the term 'danger' connotes risk, or possibility, of harm or injury, there is necessarily an element of subjective belief involved. In a declared war, no one would doubt that to carry out operations against the enemy at a place under risk of attack exposes those in the operations to danger. Yet who at the time would actually know, rather than perceive, that the place is at risk? The enemy might have no intention of attacking there, but assessments have to be made, or beliefs formed, by military authorities as to whether the place is at risk and needs defence by armed forces.

11.60 If then, the military authorities consider that a particular area is vulnerable to attack and dispatch armed forces there, they are sending forces into harm's way, or danger. This was the second point made by Mohr — that veterans ordered to proceed to an area where they are endangered by the enemy will not only perceive danger, but to them the danger will be an objective one based on rational and reasonable grounds. In these circumstances, what the historian says he or she has learned since the war about the actual intention of the enemy is hardly relevant.

CONCLUSION

11.61 The Committee concludes that the first part of the qualifying service test for World War II, which requires a veteran to have been serving in operations against the enemy, is relatively straightforward and adequately understood. However, the second part of the test, which requires that the veteran must have incurred danger from hostile forces of the enemy, is ill understood and this lack of comprehension has led to considerable inconsistency in AAT decisions. In addition, the operation of the Repatriation Commission's policy in the past has led to veterans who served overseas or in Australia's coastal waters being greatly advantaged against those who are now required to satisfy the incurred danger test.

11.62 In these circumstances, the Committee believes that the question arises as to whether the test should be redefined. This will be discussed in Chapter 12.