SUBMISSION 065

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Submission to Inquiry - Mr Raymond Fulcher

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 *

Fulcher
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Secondary Contact Number

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

Rifle Company Butterworth Review Group

Part 3 – Desired outcome

Provide a summary of your submission:

That service at Butterworth between 1970 and 1989 be classified as warlike service under the Veterans' Entitlements Act 1986. That service at Butterworth between 1970 and 1989 be awarded with the AASM with clasp Malaysia.

Part 4 - Your submission and Supporting Documentation

File Attached: 20220615-RCBRG-submission-to-DHAAT-Inquiry.docx

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

Raymond Fulcher
Date

15/06/2022 /

Signed by Mr Raymond Fulcher
Signed on: 15 June, 2022

Signature Certificate

Document name: Submission to Inquiry - Mr Raymond Fulcher

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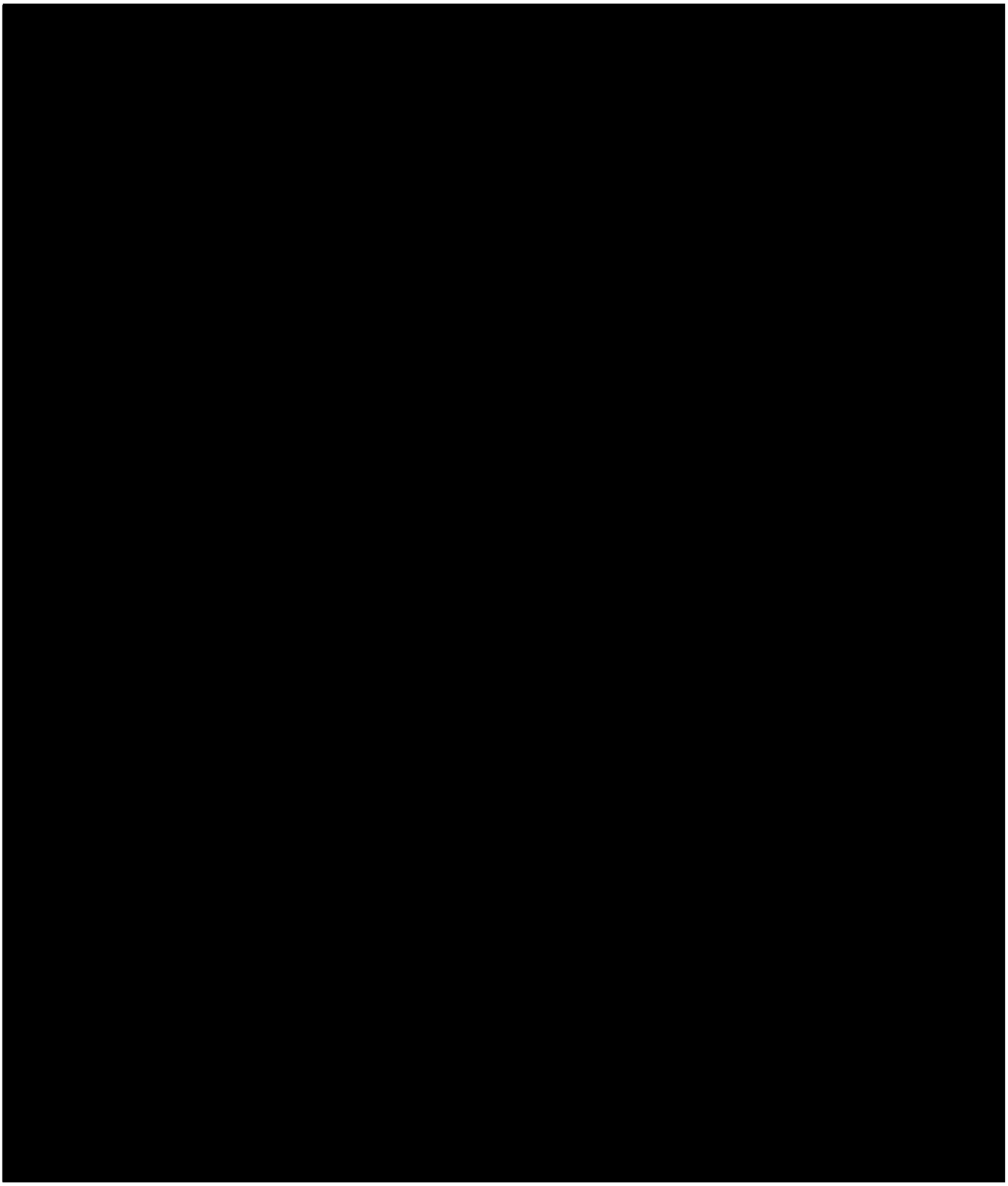

Rifle Company Butterworth Review Group

Submission to the DHAAT inquiry into medallic recognition for service with Rifle Company Butterworth

1. This submission has been prepared by and represents the views of the Rifle Company Butterworth Review Group (RCBRG). The RCBRG has been campaigning and representing to government the case for the recognition of Rifle Company Butterworth 1970-1989 (RCB) as warlike service and for award of the Australian Active Service Medal (AASM) and access to repatriation benefits. The RCBRG represents approximately 3000 surviving RCB veterans, as well as those that have passed, their widows and descendants.

2. An RCB deployment was a specific conventional defensive combat operation with the military objective of securing RAAF and Malaysian (e.g. Vital Points) assets at Air Base Butterworth (ABB) against the communist insurgent threat. Defence is a phase of war in which a military force deploys for a specific defensive/protective/security mission and that defensive force comprises two elements:

    i. Those that secure the perimeter in fixed positions or on patrol. At ABB this role was performed by Malaysian forces, such as the Handau (a Malaysian commando force), which were ostensibly responsible for securing the base perimeter and entry points.

    ii. A reserve force for counter-penetration and counter-attack roles to contain enemy penetration into the defended area and counter-attack to repel, kill and/or capture the enemy. At ABB this was the RCB's specific role – a Quick Reaction Force (QRF) not employed in sentry duties.

3. Before commencing consideration of how the New Zealand reassessment of its veterans' service affects consideration of RCB veterans' service and why that service should be recognised as warlike, entitling RCB veterans to the award of the AASM, it is worth considering the current state of RCB recognition and addressing some of the confusion surrounding it.

4. In 2001, RCB service between 14 February 1975 and 31 December 1989 was declared to be non-warlike operations.[1] In 2007 that classification was altered to be non-warlike

[1] Commonwealth of Australia Gazette, No. S 230, 29 June 2001.

from 15 November 1970 to 6 December 1972, and hazardous service from 6 December 1972 to 31 December 1989.[2]

5. The latter determinations were never added to the Federal Register of Legislation by the Department of Defence (Defence) and never had legal effect. In 2009, Defence began the process to rectify this error. In 2010, the Department of Veterans' Affairs and the Repatriation Commissioner intervened in this process to oppose any reclassification of RCB service. The latter expressed his concern that recognising RCB service would mean a "significant level of additional expenditure" for DVA.[3] Consequently, Defence conducted another review of RCB service and determined it to be peacetime service. Veterans were able to retain their ASM under the 2001 determination as Defence claimed that for medallic purposes non-warlike just means not warlike and therefore includes peacetime service. This is despite the fact that the Minute signed by the Minister to make this award was very clear that the RCB service was *not* normal peacetime service and identified a communist terrorist threat to Air Base Butterworth.[4]

6. The confusion that this chain of events has engendered can be shown by a previous DHAAT decision in 2020 wherein the Tribunal was incorrect in its finding that the 2007 determinations were current.[5] Defence have maintained to this date that RCB service was peacetime.

The recent New Zealand decision[6] should bring change to recognition of RCB service.

7. The significance of the New Zealand decision for RCB service does not lie in the particular outcomes recommended in the report as the New Zealand decision was based on New Zealand legislation and policy relevant at the time their veterans were deployed to Malaysia.[7] Whereas recognition of RCB service must be based on Australian legislation and government policy in place when RCB was deployed. The importance of this requirement cannot be overstated and has been confirmed by the Australian Government on many occasions (see para 29 below). This will lead to different specific outcomes from the same facts. The significance of the New Zealand decision lies in what led the New Zealand Defence Force (NZDF) to those specific recommendations and their finding of operational service and rejection of the peacetime service categorisation. It should be noted that the New Zealand decision overturned the previous 2012 decision of peacetime service, a decision the Australian Government has used as a reason for denying the RCB claim for warlike service and maintaining a categorisation of peacetime service.[8]

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[2] Billson, B., Minister for Veterans' Affairs, *Determination under the Veterans' Entitlements Act 1986*, 18 September 2007.
[3] Rolfe, B., Repatriation Commissioner, 'Letter to Nature of Service Review Department of Defence, CP4-3-163', 1 February 2010, DVA FOI 30170.
[4] Defence HQ, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, Minute PE 2000-34836 Pt 1, CDF 249/01, April 2001.
[5] DHAAT, Fulcher and the Department of Defence [2020] DHAAT 08 (14 May 2020), para 32.
[6] NZDF, *Reassessment of the Recommendations of The Medallic Recognition Joint Working Group on New Zealand Military Service in South East Asia 1955 to 1989*, March 2021.
[7] Ibid., para 3.
[8] For example see: Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014, p3.

8. It is submitted that the Tribunal should consider not the specifics of the findings of the NZDF review, but the evidence and principles applied in reaching the conclusions enunciated, and their applicability to the RCB situation, Australian law and government legislation and policy applicable at the time of RCB deployment to Malaysia.

9. The New Zealand report makes an important point regarding the difficulties of retrospective reclassifications. Missing documents is one issue the report points to. Another is the problem of "hindsight", knowing what actually happened and applying that to the determination rather than assessing what was known or believed at the time of the service.[9] Another pitfall identified by the report is over-reliance on the wording in official documents rather than examining what the reality on the ground was.[10] Defence has repeatedly fallen into these pitfalls in relation to RCB service.

10. The New Zealand Government ordered the new review due to representations from veteran organisations and "additional information and the availability of declassified Australian documents".[11] The New Zealand report considered that "considerable weighting be applied to the Australian declassified material…".[12]

11. The "additional information" and "Australian declassified material" presented to the NZDF reassessment were provided by New Zealand veterans. Those veterans were provided that information by the RCBRG from its ongoing research. It is the same information and material that has been repeatedly dismissed out of hand or downplayed by Defence. Some of this material is referenced in this submission and, if required, will be made available to the Tribunal.

12. Defence has maintained the position that there was no war or emergency in Malaysia during the period of deployment of RCB. The New Zealand report however disagrees:

> "In response to questions relating to the nature of service, Malaysian authorities told the Australian Government in 2004 that it considered there was an armed conflict between Malaysia and the communist insurgents between 1968 and 1989. This meant that the Malaysian Armed Forces personnel were on "active service" when involved in the operations against the CTs."[13]

The implication of this statement is clear. That is, a full two years before RCBRG began campaigning on this issue the Australian Government had again been informed by Malaysian authorities that a war was underway in Malaysia at the time but the Australian Government continued to deny it when approached by RCB veterans and has justified its findings in part on that denial.

13. The Malaysian position was reinforced again in 2020 when the Malaysian Chief of the Defence Force sent greetings on the 50th anniversary of RCB thanking the RCB for its role in "protecting the RMAF [Royal Malaysian Air Force] Butterworth base during the resurgence of the communist insurgency in 1970-1989" (Appendix A).

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[9] Ibid., paras 66-69.
[10] Ibid., para 90.
[11] Ibid., para 16.
[12] Ibid., para 118.
[13] Ibid., para 86.

14. The position of Defence and DVA is that RCB service was normal peacetime service akin to that undertaken at bases in Australia. This is clearly at odds with the findings of the New Zealand report which states:

> "Declassified material has shown that the deployment was clearly for operational reasons rather than for the stated training purposes. Intelligence assessments and operational visits identified a clear threat to the Base and the Australian Mirage fighters stationed there that required an additional layer of protection through the deployment of a rifle company initially from Singapore (shared between Australia and New Zealand) and subsequently directly from Australia."[14]

The "declassified Material" referred to is that provided by RCBRG to our New Zealand compatriots. This alone should result in reclassification of the nature of RCB service as warlike due to the identification of a clear enemy threat.

15. The New Zealand report points to two principles that it considers fundamental to assessments of the nature of service:

1. "If ADF personnel are placed in circumstances where they may be used to react to an assessed threat made by Australian Government intelligence agencies, it has to be considered operational service. This is regardless of whether the threat is realised or not."[15]

2. "It is considered that if the government judges that "a particular area is vulnerable to attack and dispatch armed forces there, they are sending forces [potentially] into harm's way, or danger"."[16]

These principles have been adopted and articulated by Australian authorities and contained in the reports of MAJGEN Mohr and Justice Clarke respectively[17] that were tabled in Parliament and accepted by the Australian Government. Defence has failed to apply these principles to RCB service.

16. The word "potentially" contained in parenthesis in the second quote above is of special significance to RCB. This is because Defence has repeatedly argued that the airbase was never actually attacked during the period and therefore RCB service cannot be warlike. The New Zealand report emphasises a point that the RCBRG has repeatedly made unsuccessfully to Defence:

> "Deterrent operations by their very nature anticipate threats, and if those threats do not eventuate, it may be because they are successful."[18]

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[14] Ibid., para 6.
[15] Ibid., para 70; from Minute ADF Director-General Personnel Executive to CDF, 28 March 2001.
[16] Ibid., para 9; from "The Report on the Review of Veterans' Entitlements", Hon John Clarke, QC, January 2003.
[17] Mohr, R.F., Kennedy, P.G.N, and Bloomfield, T.*, REVIEW OF SERVICE ENTITLEMENT ANOMALIES IN RESPECT OF SOUTH-EAST ASIAN SERVICE 1955-75*, February 2000; Clarke, J., *The Report on the Review of Veterans' Entitlements*, Hon John Clarke, QC, January 2003.
[18] NZDF, *Reassessment of the Recommendations of The Medallic Recognition Joint Working Group on New Zealand Military Service in South East Asia 1955 to 1989*, March 2021, para 132.

The fact that RCB's presence at Butterworth deterred the Communist Terrorists (CT) from attacking the base should not be used as a reason to deny RCB veterans proper recognition of their service.

17. In its letter to the RCBRG dated 22 April 2022, the Tribunal asks the RCBRG if RCB service should be classified as warlike and:

> "If so, why, noting the Report that underpinned that reconsideration recommended that no campaign medal be instituted for New Zealand service at Butterworth?"[19]

18. In response to the question of a New Zealand campaign medal the following is offered.

19. Although the New Zealand report approves the award of the New Zealand Operational Service Medal for the New Zealand RCB deployments, it recommends that a campaign medal *not* be instituted:

> "It is recommended that all of the 1 RNZIR deployments to Butterworth 1971-1973 be approved as qualifying time for the New Zealand Operational Service Medal (with seven days qualifying service required to be awarded this medal) but no campaign medal be instituted. The above recommendation is consistent with the New Zealand medallic principles because service at Butterworth was beyond normal peacetime service."[20]

It is clear that this decision is based on the New Zealand Government's "principles for recognising operational service".[21] These are different to Australia's principles. For instance, award of the New Zealand Operational Service Medal only requires "seven days qualifying service"[22] whereas an award for operational service under the Australian system requires 30 days qualifying service.

20. The primary reason given in the New Zealand report not to recommend award of a campaign medal was that most of the deployments would not meet the timeframe to qualify:

> "Only five of the 14 deployments would meet a 30-day qualifying period if the two deployments under the guise of exercises are included."[23]
>
> "The difficulty is that only a portion of those who deployed to the area would meet the 30-day qualifying period and the nature of some of this service would make it a very "soft" campaign medal. Rather than try and separate out this deployment from all the others over the full period of service in Malaya/Malaysia it is proposed to take a more inclusive approach through the award of the NZOSM."[24]

21. The implication of these statements is that had the deployments met the 30-day requirement then the report would have recommended instituting a campaign medal for RCB service. However, what is important to note is that the New Zealand and Australian medallic recognition systems are different and different results are likely even from the

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[19] Skehill, S., Chair Defence Honours and Awards Appeals Tribunal, *Letter to Mr Ray Fulcher Chairman Rifle Company Butterworth Review Group*, 22 April 2022, DHAAT/OUT/2022/301.
[20] NZDF, *Reassessment of the Recommendations of The Medallic Recognition Joint Working Group on New Zealand Military Service in South East Asia 1955 to 1989*, March 2021, para 119.
[21] Ibid., para 62
[22] Ibid., para 119
[23] Ibid., para 118.
[24] Ibid., para 164.

same set of circumstances. What the Tribunal should consider is what the Australian system would determine given the facts available. Even though the Australian RCB deployments were predominately for 90 days they would not after all qualify for a New Zealand campaign medal as they are not New Zealand troops. Nor does the RCBRG seek a specific campaign medal, just the AASM with clasp Malaysia.

22. For the above reasons the New Zealand decision should bring about change to the recognition of RCB service to 'warlike' service and the award of the AASM.

RCB service should be recognised by the award of the Australian Active Service Medal

23. The award of the AASM hinges on the nature of the service given by the veteran. Of the current definitions for nature of service – peacetime, non-warlike, warlike – only warlike attracts the award of the AASM.

24. But, as discussed below, these definitions were not in force during the period of RCB service in question. However, the concept of warlike service is not new and although it has been worded differently over the decades the determination of warlike service has always been underpinned by the application of the incurred danger test.[25]

25. In order to determine whether RCB service was warlike and therefore deserving of the award of the AASM, the Tribunal should place itself in the position of the original decision maker, unconstrained by any of the extraneous political considerations of the time that prevented RCB service from being properly classified.

26. The Tribunal should, in the light of the legislation and policy in place at the time, determine whether RCB personnel should have been allotted for special duty in a special area in accordance with the relevant government policy, which is Cabinet Directive 1048 of 7 July 1965[26] and accordingly find that the service of RCB personnel was warlike service.

27. Defence maintains that service in RCB 1970-1989 "…is appropriately classified as peacetime service."[27] That is that RCB service was in no way, shape or form operational. To support this claim, Defence relies on assertions that are factually wrong and contrary to law. Furthermore, Defence has also relied on selective use of official documents whilst ignoring other documents that conflict with its views.

28. Defence, through its Nature of Service Branch (NOSB)[28], correctly states that "All nature of service reviews are considered in the context of the legislation and policies at the time

[25] Clarke J, *Report of the Review of Veterans' Entitlements,* 2003, Chapter 13.
[26] Cabinet Minute, Decision No, 1048, Submission No. 834, *Principles on which Eligibility for War Service Homes Loans is determined and the Consequences of their continued application on the Demand for Loans – Examination and Report by Inter-departmental Committee*, Melbourne, 7 July 1965
[27] Cooper, J, Ministerial Correspondence, *Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 11.
[28] Redesignated as Nature of Service Directorate.

of the activity or operation under review."[29] This has been reiterated on a number of occasions; for instance, in a 2018 brief to Minister Chester, Ms Jaqueline Cooper, Director Nature of Service, stated that " ... reviews of the nature of service classification for past service are considered in the context of the legislation and policies that applied at the time of the service".[30] Senator Marise Payne also advised Parliament using much the same wording.[31] Further the NOSB operating procedures state the same.[32]

29. For RCB, the relevant legislation was the *Repatriation (Special Overseas Service) Act* 1962 (SOS Act), which was in force until 22 May 1986 when it was repealed and replaced by the *Veterans' Entitlements Act* 1986 (VEA). The relevant government policy was Cabinet Directive 1048 of 7 July 1965.

30. Before considering RCB service under relevant policy and legislation, it is worth reviewing what Clarke J said in his *Report of the Review of Veterans' Entitlements 2003* (Clarke Review) regarding the changing legislation and concurrent definitions relating to veteran entitlements. He said:

> "13.11 The Government appears to have had no difficulty in providing qualifying service entitlements for service in Korea and the most intense period of the Malayan Emergency between 1950 and 1957. However, it was not until 1968 that qualifying service benefits were extended to those allotted for special duty in a special area under the SOS Act that covered operations in Vietnam, the Malay-Thailand border, the Malay Peninsula, Singapore and areas of Borneo during Confrontation. The principal reason for this service not being accorded qualifying service status at the time of those operations was that the risk to personnel involved was not initially assessed to be as great as that experienced in earlier wars. The comparison of this type of service with that rendered in the two World Wars illustrates an attempt, however flawed, to adopt consistent criteria in determining what service would provide access to service pension benefits.
>
> 13.12 The next, and better, attempt to adopt a principle consistent with that which applied in World Wars I and II in conferring qualifying service benefits is illustrated in the second reading speech by the Minister for Repatriation, Senator McKellar, for the 1968 SOS Bill, in which he said:
>
> > The second amendment that the Bill proposes is to extend eligibility for service pensions to those who have served on special service under the Repatriation (Special Overseas Service) Act. The government believes that the nature of the special service, which is similar to theatre of war service in earlier wars, justifies the recognition of its intangible effects in the future."

31. That is, a consistency of meaning and application from WWI onwards whether the legislation says 'theatre of war', 'allotment for duty', or '*warlike'* is what was intended. It

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[29] NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 108.
[30] Cooper, J, Brief *PDR mb-18001788 dated 27 November 2018*, bullet point 4, page 2.
[31] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber/hansards/ba59771f-8f40-41e7-8c9d-7151ea810dd0/0046;query=Id:%22chamber/hansards/ba59771f-8f40-41e7-8c9d-7151ea810dd0/0061%22
[32] Department of Defence, *MILITARY STRATEGIC COMMITMENTS STANDARD OPERATING PROCEDURE CHAPTER 21: NATURE OF SERVICE DIRECTORATE PAST OPERATIONS*, FOI 501/17/18.

follows that legal precedent set in relation to those earlier definitions remains applicable when determining the nature of service today.

32. Defence has contended that RCB service does not meet the "essential criteria for classification as *special duty*, as *warlike* or *non-warlike* service, or as *hazardous service*".[33] That is, that RCB does not satisfy any of the criteria under either the SOS Act or the VEA. For determining RCB classification the current VEA is not relevant as, although it came into effect in 1986, it still relied on allotment for duty as under the SOS Act and Cabinet Directive 1048. This remained the case until a new framework came into effect in 1993.[34]

The Repatriation (Special Overseas Service) Act 1962

33. Defence contends that:

> "Special overseas service (which is equivalent to *warlike* service) was achieved when three conditions were met:
>
> - that a special area has been prescribed;
> - that the personnel were serving in the special area; and
> - that personnel were allotted for special duty within the special area.
>
> Special duty is defined in the Act as:
>
> > "…duty relating directly to the warlike operations or state of disturbance by reason of which the declaration in respect of the areas was made…"[35]

34. For political and diplomatic reasons that will be explored later the procedure contained in the SOS Act was not followed. But *that* is not the end of the matter as Defence seems to believe. The question that should be asked is not '*was* the proper procedure for allotment followed?' but rather '*should* RCB service have been prescribed and its personnel allotted at the time, given the facts revealed since?'. As Mohr J said in the *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*:

> "There has been no single topic which has affected so many possible anomalies as the matter of "allotted" or "not allotted". I am fully conscious of the provisions governing the award of medals, qualifying service, etc, in Warrants, Acts and guidelines. The point is however, that so many members of the ADF served in South-East Asia during the period of the Review had no idea of the necessity for themselves or their unit to have been 'allotted' before they received qualification for a medal or repatriation entitlements and now find themselves disadvantaged years later because those who ordered them to do their duty, which they did, took no 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

[33] Ibid., para 159(d).
[34] Cabinet Decision 1691, 17 May 1993.
[35] Ibid., paras 109-110.

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."[36]

35. Regardless of whether the proper administrative procedures were followed it is clear that RCB personnel were allotted to carry out a special duty (including the QRF and base defence) within a special area (largely, but not exclusively, within the perimeter of ABB).[37] Interestingly, It is important to note that it was not until 2000 that many ADF personnel who served in South East Asian conflicts were belatedly and formally allotted for special duty in a special area, including personnel who served in the Malayan Emergency.[38] Given this and other similar precedents, there is no reason that RCB personnel cannot now be allotted. In any conflict, the rules of equity should prevail. According to the equitable maxim 'Equity looks on as done that which ought to be done'.[39] Given the evidence provided in this submission the Tribunal should consider that allotment under the SOS Act ought to have been done.

Allotment

36. With regard to RCB service, the reason for non-allotment and the failure to prescribe a special area at the time was not an oversight or lack of knowledge as Mohr J alludes to above. Rather it was a calculated policy to defer to diplomatic and domestic sensitivities confronting the Australian Government that Defence has never addressed. Documents of the time speak of the sensitivities of the Malaysians to the presence and activity of foreign forces at Butterworth. In a paper written in 1972 discussing security improvements at Butterworth, it was said that:

> "Taking into account Malaysian sensitivities, our security measures should be relatively unobtrusive. To meet the situation security should be based on:
>
> a. effective local security which includes good observation; and
> b. a quick reaction capability."[40]

37. In his book *Kampong Australia: The RAAF at Butterworth*[41], author Matthew Radcliffe sheds light on what those sensitivities were. Radcliffe points to Malaysian sensitivity to the presence of foreign troops in a recently independent country and the lengths to which the Australian government would go to protect the Malaysian government from resultant domestic criticism. He discusses the "3rd Campism" of the Malay population in the context of the Cold War and perceived alliance with either West or East. He highlights the popular mistrust of organisations such as SEATO which were viewed by Malays as simply promoting western imperial aspirations and the more pragmatic view of the Malaysian government who understood the necessity of SEATO and their own inability to provide defence of their new nation. The Anglo Malayan Defence Agreement (AMDA –

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[36] Mohr, R.F., *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, 2000, p7.
[37] For example: Air Base Butterworth Op Order No 1/71, 8 September 1971; Department of Air, Brief for DCAS Concerning Security of Butterworth, undated, Ref 564/8/28.
[38] Defence Personnel Executive, Minutes and various instruments, Defence FOI 037/20/21, https://drive.google.com/file/d/1DJi6gcwZP5T2PDkRUAbM93BXv-UtFYBp/view?fbclid=IwAR0U4lc4TVy15BJhCcqNsB5TcO71jPghY821RH1ERh5iCb2i1Ti8E891h2I
[39] *Walsh v Lonsdale* (1882) 21 Ch D9.
[40] Commander ANZUK Force, *Security of Air Base Butterworth*, ANZUK 007/3001/1/OPS, 15 March 1972, para. 8.
[41] Radcliffe, M, *Kampong Australia: The RAAF at Butterworth*, New South Publishing, 2017.

the Commonwealth plan to stop China at the narrows of the Malay peninsula in event of war), Radcliffe says, was "worded to accommodate domestic opinion in both Britain and Malaya…" and "…amounted to a mutually acceptable vagueness".[42] Radcliffe highlights the popular view by citing a Malay journalist from 1955:

> "The independence we shall soon attain will be useless if such foreign troops still remain in our country… Our political independence will have no meaning at all if that independence does not include independence in … defence."[43]

38. This attitude of the Malay population almost boiled over around AMDA and its perceived (correctly) delegation of "responsibility for external defence" to foreign forces.[44] The Malaysian Government had to intervene, effectively threatening to resign over the matter in order to restore some calm. Radcliffe further argues that the government's and country's very stability now "…depended upon successfully managing the public's perception of the Commonwealth forces."[45]

39. Nor were these concerns limited in time to the very early days of Malaysian independence but rather continued into the period of RCB deployment as described by Australia's High Commissioner to Malaysia in a message to Canberra:

> "The concept of an integrated ANZUK presence continues to be something of a spectre with Zaiton."[46]

40. Domestically, the Whitlam government had been elected on a platform of withdrawal of all Australian ground combat forces from South East Asia, replacing 'Forward Defence' with 'Fortress Australia' and so any continuing presence of Australian ground combat forces in the region could potentially embarrass the government. This was confirmed by the Vice Chief of the Defence Force (VCDF), Admiral David Johnston, in a letter to Ms Cathy McGowan, AO, MP dated 26 April 2019. The VCDF advised Ms McGowan:

> "Due to the sensitivities at the time in relation to the deployment of Australian land forces overseas for the purposes of forward defence of Australia, the Minutes state that the deployment of the infantry unit could be presented publicly as being for training purposes."[47]

41. However, due to Australia's commitment to the Five Power Defence Arrangement (FPDA) and its primary role as the leader of the Integrated Air Defence System, the RAAF presence could not be withdrawn from ABB. Accordingly, there was an on-going requirement to provide security for the two squadrons of RAAF Mirage fighter aircraft based there as well as there was a requirement to protect the essential functioning of the airbase. This is highlighted by concerns discussed at the time which clearly show that although the Malaysians had nominal responsibility for the protection of Butterworth airbase, their actual capacity to do so was lacking. This elevated the importance of providing an Australian infantry company to bolster the defence capability of the base:

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[42] Ibid., p38.
[43] Ibid., 32.
[44] Ibid., p39.
[45] Ibid., p40.
[46] High Commissioner, Kuala Lumpur, *Five Power Defence: Butterworth Company*, 6 January 1972.
[47] Johnson, D., VCDF*, Letter to Ms Cathy McGowan AO, MP*, PDR ID: EC19-002341, 26 April 2019.

"Capacity of Butterworth to meet the Threat

Cognizance has been taken of the statement that "…there is a significant deficiency in the capability at Air Base Butterworth to oppose or even contain any attack or sabotage attempt."…

The Malaysian lack of capacity to effectively provide for their role in the security of Air Base Butterworth is a cause for serious concern, and is prejudicial to the security of ANZUK installations and equipment."[48]

"A recent report from Air Base Butterworth indicates that the security arrangements at the Base are less than adequate."[49]

"Local authorities have stated that no Malaysian Security Force contingency plan exists for the reinforcement of Air Base Butterworth. It is not known if such a plan exists at the Ministry of Defence. A locally known plan, which has been implemented once in 1975, allows for the deployment of troops from HQ 6MIB at the request of OC RMAF Butterworth. Troops from 6 MIB are fairly heavily committed on the Thai/Malaysian border and the size of the force that could be sent to Butterworth depends largely on this commitment. The nearest artillery units to Butterworth are at Taiping."[50]

42. Fortunately for the Australian Government of the time the Defence Committee in 1973 provided a solution that would allay Malaysian sensitivities and neutralise the potential for uncomfortable domestic questions. At its 11 January 1973 meeting, the committee proposed that:

"When the Australian Battalion is withdrawn from Singapore the requirement for a company for security duties at Butterworth will be met by providing the unit on a rotational basis from Australia. This could be presented publicly as being for training purposes"[51]

43. This was not the first time that Defence had seen the value in camouflaging the presence of Australian troops at Butterworth. In a letter from A. H. Tange, Secretary, Department of Defence, to the Secretary, Department of Air, regarding '*Security at Butterworth*' he said:

"… In addition, Malaysian reluctance having been overcome, the ANZUK force will now provide one infantry company on rotation through Butterworth on a full-time basis, ostensibly for training, flag-showing and a change of scene. The presence of this company will provide the Commander with a ready-reaction force which he can use inter alia to supplement elements available to him under the joint Malaysian-RAAF Plan…"[52]

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[48] Commander ANZUK Force, *Security of Air Base Butterworth*, ANZUK 007/3001/1/OPS, 15 March 1972, para. 5.
[49] Royston, R.S., *Security Situation – Air Base Butterworth Report No 34*, INT 8/10/3 (150), 4 August 1975, para 6.
[50] Royston, R.S., *Security Situation – Air Base Butterworth Report No 34*, INT 8/10/3 (150), 4 August 1975, para 7.
[51] Defence Committee Minute, *Five Power and ANZUK Arrangements and Withdrawal of Australian Battalion and Battery*, Minute No. 2/1973, 11 January 1973.
[52] Tange, A.H., *Security at Butterworth*, Ref. 71/3160, 2 March 1972.

44. The Vice Chief of the General Staff visited Butterworth in 1973. His briefing included the advice that:

> "The deployment of the company to Butterworth has in recent years assumed a real importance because of the somewhat increased concern about possible threat to base security. Although Malaysia may be expected to have assumed that this is the case, publicly and privately the position is maintained on both sides that the deployment is for exercise purposes."[53]

45. The Australian High Commissioner in Malaysia advised the Australian Government that the Malaysians themselves urged the use of the 'training camouflage' for the company:

> "Zaiton muttered about the presentational difficulties and maintained that the only raison d'etre could be the furthering of training."[54]

46. The refrain is the same, that the deployment of an infantry company to Butterworth was for base security in the face of the CT threat but that needed to be camouflaged and the Malaysians were in on the subterfuge for their own reasons. Defence has never examined the implications of this evidence on *why* RCB was not allotted to a prescribed area. It would have been impossible to maintain the necessary camouflage had the proper administrative procedures been followed so that the troops met the three administrative criteria for special overseas service under the SOS Act.

Cabinet Directive 1048 of 7 July 1965

47. It must be said that Defence does not just rely on the administrative "conditions" contained in the SOS Act to claim that RCB service was not "special duty". They refer to Cabinet Directive 1048 of 7 July 1965[55] which sought to clarify for the ADF how the SOS Act was to be implemented, it said:

> "…that the Services be directed that allotment for "special duty" should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces or dissident elements; in the present circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to Indonesian infiltrators or communist terrorists in circumstances where there has been a specific request for the assistance of Australian forces and where the task has been clearly defined…"[56]

48. Defence further states that:

> "ADF service at RAAF Butterworth from the end of confrontation in 1966 to the end of the infantry rifle company's quick-reaction role in December 1989 does not meet the essential criteria for allotment for special duty in a prescribed area for the purposes of

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[53] Defence Planning Division, AWM 209-H-2 Folio 140, *VCGS Visit to Malaysia: The Butterworth Company*, 11 October 1973, para 3.
[54] High Commissioner, Kuala Lumpur, *Five Power Defence: Butterworth Company*, 6 January 1972.
[55] NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 111.
[56] Cabinet Minute, Decision No, 1048, Submission No. 834, *Principles on which Eligibility for War Service Homes Loans is determined and the Consequences of their continued application on the Demand for Loans – Examination and Report by Inter-departmental Committee*, Melbourne, 7 July 1965, Recommendation 1.

the Act. There were no requests from the Malaysian Government to the Australian Government for military assistance after 14 September 1966."[57]

49. Defence has further contended that:

> "While Australian forces remained in Malaysia following the Confrontation ceasefire on 11 August 1966, the Malaysian government made no further requests for assistance in security operations. Accordingly, Australian forces were not engaged in any operations against hostile forces or dissident elements."[58]
>
> and
>
> "Because no state of war or emergency existed in Malaysia after the end of confrontation on 11 August 1966 and because the Malaysian government made no request to the Australian government for military assistance after this date, ADF personnel were not engaged in duty relating to warlike operations or a state of disturbance in Malaysia between 1970 and 1989. As a result, ADF service, including those at Butterworth, cannot be considered to be special service under this act at the time, the Repatriation (Special Overseas Service) Act 1962."[59]

50. The approach taken by Defence sets Cabinet Directive 1048 on its head. This approach elevates the subordinate clause dealing with a particular situation ("in the present circumstances"), which occurred well before RCB deployments, above the directive on how "allotment for 'special duty' should … be made" under the Act and the approach raises the subordinate clause to the level of the governing principle of when allotment can be made. This was clearly not the intent of the Cabinet. Nor was it the view of Clarke J, who said in his report:

> 13.9 "The type of service required for allotment is explained in a 1965 Cabinet decision, which stated:
>
> > That the Services be directed that allotment for "special duty" should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces or dissident elements…
>
> 13.10 This direction was made by Cabinet as a consequence of its adoption of a recommendation made by an interdepartmental committee, comprising representatives of the Prime Minister's Department, the Treasury and the Departments of Housing and Repatriation, set up to examine the principles on which eligibility for war service home loans was determined. The interdepartmental committee considered that there was a need for a clear directive from Cabinet about the factors to be taken into account by the armed services in making allotments for special duty if uniformity was to be maintained between the services."[60]

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[57] NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 112.
[58] Cooper, J, Ministerial Correspondence, *Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 10.
[59] Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.
[60] Clarke J, *Report of the Review of Veterans' Entitlements,* 2003, paras 13.9-13.10.

51. Thus, Clarke J correctly identified the core principle for applying the SOS Act and does not mention the subordinate clause. The principle identified by Clarke J was essentially a re-statement of the 'incurred danger' test.

52. An in-depth analysis of Cabinet Directive 1048 and the inter-departmental committee's report it arose out of is contained in Appendix B.

53. Furthermore, although Defence makes much of the 'Malaysian request' scenario, a simple examination of the historical background to RCB deployment would show that it was unnecessary for Malaysia to request Australian troops to guard the air base as they were already doing so, not only RCB but also the RAAF as part of the Shared Defence Plan. And were doing so under the auspices of the Five Power Defence Arrangement and the Exchange of Notes between Malaysia and Australia.[61]

54. Accordingly, the question that needs answering is not 'was the correct paperwork done' or 'did Malaysia request our presence' but rather 'were RCB troops exposed to potential risk by reason of the fact that there was a continuing danger from activities of hostile forces or dissident elements' in accordance with Cabinet Directive 1048. That is, did RCB meet the incurred danger test which Defence, in a 2007 brief to then Minister Bruce Billson, has confirmed was at the heart of RCB service:

> "The notion of incurred danger, as a basis for granting access to veterans' entitlements, warrants close examination as it underpins the criteria which applied at the time the RCB was deployed in Butterworth."[62]

Unfortunately, neither that brief nor any subsequently went on to provide a "close examination" of this notion even though it "underpins the criteria" applicable to RCB service. Rather, the notion of incurred danger as it relates to RCB has repeatedly and significantly been downplayed.

RCB incurred danger from hostile forces

55. The following is a small sample of evidence gleaned from documents at the time of the RCB deployments that demonstrate that RCB troops were indeed 'exposed to potential risk by reason of the fact that there was a continuing danger from activities of hostile forces or dissident elements':

- "There is a potential threat to the base from the Communist Party of Malaya (CPM), the Communist Terrorist Organisation (CTO), and related communist subversive organisations, whose aim is the establishment of a communist state in Malaysia Singapore, ultimately by "armed struggle"- widespread guerrilla/military action- and who have an estimated 1,800 to 2,000 terrorists in the Thai Malaysia border area. Of these some 300 are estimated to be within West Malaysia, with some 60, assumed to

[61] National Archives of Australia, *Five Power Defence Arrangements – Exchange of Notes constituting an Agreement Between the Government of Australia and the Government of Malaysia Regarding External Defence*, Barcode 30156205, 1 December 1971.
[62] Gillespie, RJ, VCDF, *REQUEST FOR NATURE OF SERVICE REVIEW OF RIFLE COMPANY BUTTERWORTH (RCB) 1970 TO 1989*, 28 August 2007, Ref B660823, Attachment A, para 19.

be armed with rifles, machine guns and explosives, in the Kulim and nearby forest areas approximately 15 to 25 miles from the base."[63]

- "… there is definitely a risk that one or more CTs or members of subversive groups known to be operating in the vicinity, could, regardless of CPM/CTO policy and/or acting on their own initiative, attempt an isolated attack on or within the base at any time."[64]
- "We assess that advanced warning of any form of attempted attack (other than by a large group of CTs which we assess as unlikely) would most probably not be received whether the attack be by CTs or members of subversive groups."[65]
- "Although we assume that Australian aircraft would not be deployed from Butterworth in an anti-terrorist role, the use of the Base by RMAF units for anti-terrorist air operations might prompt a CTO reaction."[66]
- Mortar "or other indirect weapon attack" by up to 10 men "located in the surrounding ricefield/kampong areas" was considered "likely if the CTs acquired a mortar capability".[67]
- "There has been a marked increase in recent months in the use of modern weapons by the CTO including M16 rifles, 7.62 SLR, 9 mm sub-machine guns, and M79 grenade launchers. There is also evidence of 81/82 mm mortars."[68]
- "OC Butterworth had advised that rocket attacks have taken place at RMAF Base Sempang (Kuala Lumpur) and a military installation at Penang on 31 March and 1 April 1975. The RMAF has also advised of possible threats to Butterworth."[69]
- "The recent intelligence information concerning possible CTO intentions to launch rocket attacks on bases in Malaysia increases our concern regarding the security of areas around the base. Intelligence sources consider there is a possibility that CTs have or are able to obtain 81/82mm mortars to supplement their known supplies of 3.5 inch rockets. Mortars are crew served weapons which are accurate area weapons of considerable destructive force against targets at maximum ranges of 4,700 metres. The attached map shows that at a range of 3000 metres from the Butterworth Base, a perimeter of 16,000 metres is formed. To compound the problem of defence, the area within the perimeter includes a large number of Malaysian houses, a network of roads and several hectares of padi-fields, all of which offer CTO assembly and firing bases."[70]

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[63] *The Threat to Air Base Butterworth to the End of 1972,* (ANZUK Intelligence Group, 1971), para 54. (b).
[64] Ibid., para 54 (e).
[65] Ibid., para 56.
[66] Joint Intelligence Organisation, *The Security of Air Base Butterworth*, October 1975, para 46.
[67] *The Threat to Air Base Butterworth to the End of 1972,* (ANZUK Intelligence Group, 1971), para 57, [paraphrased].
[68] JIO, 2 October 1975, *JIO Assessment of Threat and Likely Method of Attack,* 554/9/33(87), as Annex A to: Rowland, 7 October 1975, *Security of Butterworth,* addressed to 'Minister', para 7.
[69] Rowland, J.A, AM, CAS, 3 April 1975, Department of Defence (Air Office) Minute 418/4/12, *Butterworth Base Security.*
[70] Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam,* addressed to 'Minister', Para 2.

- "…the obvious and immediate effects from rocket mortar and other forms of attack… [would be] the death and injury to personnel and families."[71]
- "The split in Oct 74 of the CPM into three factions … has resulted in some inter-factional conflict, but it seems also to encourage the groups to compete with each other for success against security forces. This is an important factor to be considered in assessing the likelihood of terrorist activity against military establishments such as Butterworth. Defence Adviser Kuala Lumpur reports that recent developments – including the upgrading in training and military status of the CTO – represents a significant diversification of, and increase in, the forces available with a capability of launching an attack against Air Base Butterworth. In the Kulim area, 20-30 kms from the Base, there are believed to be 62 members of the Assault Unit, with 15-20 of these considered to be 'hard-core' terrorists."[72]
- "The CTO has demonstrated his capacity to mount operations against security forces during the past year. Based on these incidents, there is an increased likelihood of attack on Air Base Butterworth – probably by use of 3.5 inch rockets. There is a lesser probability of an attack using mortars."[73]
- "The threat of mortars and rockets presents a problem of providing adequate passive defence arrangements to prevent or mitigate the effects of attack by these weapons. In April 1975 following the rocket attack on Minden Barracks, Mirage aircraft were dispersed, but as this practice exacerbated the problems of patrolling and security lighting the aircraft lines, the practice ceased within a month."[74]
- "The only real protection for aircraft against mortars and rockets is to provide hardened roofed over revetments at costs of about $100,000 each. Open roofed revetments or dividing blast walls are reasonably effective against rockets, but less effective against the more accurate mortar."[75]
- "On-base security arrangements to protect against sabotage or to react quickly to any attempted incursions by CT groups are satisfactory. An ARA Company on three monthly rotation provides a quick reaction force against attacks on the base, but are currently prevented from operations off the base …"[76]
- JIO aerial photo of Airbase Butterworth showing likely direction of enemy attack by day or night (Appendix C).

56. The nature and extent of this evidence, including assessments of the Australian Joint Intelligence Organisation, demonstrates that it is completely implausible that Defence could seek to justify denial of RCB service as warlike on the basis that RCB troops did not face a "potential risk" from "hostile forces or dissident elements".

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[71] Department of Air, *Brief for DCAS Concerning Security of Butterworth*, 564/8/28, October 1975, Para 12.
[72] JIO, 2 October 1975, *JIO Assessment of Threat and Likely Method of Attack,* 554/9/33(87), as Annex A to: Rowland, 7 October 1975, *Security of Butterworth,* addressed to 'Minister', para 4.
[73] Ibid, para 16 .
[74] Department of Air, *Brief for DCAS Concerning Security of Butterworth,* 564/8/28 (undated but internal evidence verifies October 1975), Para 24.
[75] Ibid, para 25. Open roofed revetments were installed at Butterworth by 1977.
[76] Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam,* addressed to 'Minister', Para 4.

57. More recently, Defence has also confirmed the potential risk to RCB personnel from hostile forces and dissident elements, again, a small sample:

- Defence has referred to Security Assessments of the time and have noted that while there was no external threat to Malaysia "…there was a potential threat to the Base from the Communist Party of Malaysia (CPM), the Communist Terrorist Organisation (CTO) and other related subversive organisations."[77]

- "The communist terrorist threat was proven to be real with recorded clashes on a number of occasions within its borders until Chin Peng, the Communist Leader, signed a peace accord in 1989."[78]

- "The RCB was established in 1970 as a quick-reaction force to provide protection for Australian assets within the perimeter of the Royal Malaysian Air Force Base Butterworth due to the continued threat of armed Communist terrorism within its borders."[79]

- "Besides securing protection for the two jet squadrons within the perimeter of the Air Base, the role of the RCB was to provide a quick-reaction force to meet the communist terrorist threat, and be responsible for internal security within Air Base Butterworth."[80]

- "No attempt has been made by Defence to conceal the fact that there was a level of threat to RAAF Butterworth, but the level of threat was assessed as low."[81]

58. This last comment by then Minister Robert highlights Defence's approach of continually seeking to downplay the threat posed to the airbase at Butterworth in order to justify classifying RCB service as peacetime. Other examples include:

- "There was never an attack on RAAF Base Butterworth by communist terrorists."[82]

- Defence was provided with evidence from the Commanding Officer's Reports for Base Squadron – Air Base Butterworth, that the Ground Defence Operations Centre (GDOC) at Butterworth was activated and manned due to "possible ground threat" and other reasons.[83] The GDOC was established to manage all types of emergencies at the air base, including security related emergencies and was an

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[77] Department of Defence*, Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 28.
[78] Barrie, C.A., ADML CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, 10 April 2001, Ref. CDF 249/01.
[79] Ibid.
[80] Ibid.
[81] Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.
[82] Ibid.
[83] National Archives of Australia, A9435, 75, Commanding Officers' reports – Monthly reports unit history sheets (A50) – Base Squadron, Butterworth, 1944 to 1988. **NOTE**: reports later than 1978 were still sealed at the time of the research.

integral part of the defence of the base under the Shared Defence Plan. Defence dismisses the activation of the GDOC for "possible ground threat" thus:

> - "It is reasonable that an operations centre would be manned in instances of possible threat to the base.
> - Note that the manning was on the basis of 'possible ground threat' and not 'expected attack'."[84]

- "Defence contends that, in order to ensure that training conducted at Butterworth was as realistic as possible, the likelihood of hostile action may well have been overstated to the soldiers and this could explain the misconception about the role of the infantry company and the hazards faced."[85]

59. Defence's contention in the last dot point above is that infantry soldiers were placed in an allied country currently fighting an insurgency, on an active air base used by the Malaysian Armed Forces to mount operations against CTs, adjacent to the main north-south road, next to civilian habitation, issued live ammunition and orders to use lethal force and were briefed regularly that there was a threat to the airbase from communist terrorists that were located and operated nearby. The assertion by Defence that all this was done to facilitate training is not only factually incorrect but ludicrous and offensive.

60. Defence looks with hindsight on events and situations to give those events and situations a more benign air than was perceived by authorities at the time. A case in point is the cutting of holes in the airbase perimeter fence in the mid to late 70s. Defence says that:

> "Instances of the perimeter fence being cut were not attributed at the time to communist terrorists, but considered to be done for the purpose of petty theft."[86]

61. It is true that these breaches in the base perimeter fence were eventually put down to theft. However, the initial response of authorities at the time was not so blasé, and given the threat environment an appropriate response was mandated to meet "suspected attempted entry to Air Base Butterworth" and a concurrent increase of Communist Party activity in the area:

> "Reaction patrol combed area to ensure no entry had been made."
> "Increased security consisting of 5 standing patrols of half section strength deployed during hours of darkness, one section picket of aircraft lines and AIRMOV [Air Movements] area and normal ready reaction section will continue until at least 8 August."[87]

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[84] Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014.
[85] Cooper, J, Ministerial Correspondence, *Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 13.
[86] Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.
[87] Cipher message, HQBUT to DEFAIR Canberra 65 GL section, DCR 005/05, August 1975.

62. The law, while not simple, is well established and does not require a high level of threat, or for an attack to occur, or even be imminent, for the threat to meet the threshold. As the Defence Honours and Awards Appeals Tribunal (DHAAT) has previously summarised:

> "Both the Clarke Review and repatriation law provide ample interpretation of the notion of incurred danger. Various courts and tribunals 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. Indeed, it is strongly arguable that the belief of authorities that an enemy poses a significant threat to a particular part of Australia (leading, for example, to the Government sending forces to defend that area, or to conduct operations in that area) provides strong evidence that the forces sent in response to that threat have been sent into harm's way and therefore have incurred danger. In fact, the danger need only be possible, not probable, nor does it have to eventuate."[88]

63. In relation to Defence's contention that "hostile action may well have been overstated" (note, not "fabricated" but "overstated" – even here Defence concedes that there *was* a threat) Mohr stated:

> "On the assumption 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 that he will be in danger, then that member will not only perceive danger, but to him it will be an objective danger on rational and reasonable grounds. If called upon, the member will face that 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."[89]

64. Personnel at Butterworth *were* given warnings "by those in authority" as exemplified in Commanding Officer Reports for Base Squadron Air Base Butterworth, for example:

> "FLGOFF G.R. Penney GRDEFO briefed new arrivals on the security situation in the country, current threat to the Air Base Butterworth and ground defence organization of RAAF Butterworth…"[90]

A Statutory Declaration completed by G.R. Penney and detailing his knowledge, as the RAAF ground defence officer at Butterworth airbase, of the intelligence assessments underpinning the threat situation at Butterworth airbase is at Appendix D.

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[88] DHAAT, *Inquiry into Recognition of Australian Defence Force Service for SpeciaL Air Service Counter Terrorist and Special Recovery Duties*, 22 December 2009, para 81.
[89] Mohr R.F., R*eview of* S*ervice* E*ntitlement* A*nomalies in* R*espect of* S*outh*-E*ast* A*sian* S*ervice 1955-75*, February 2000, p9.
[90] *Commanding Officer's Report – Base Squadron Air Base Butterworth*, July 1980.

65. Headquarters Field Force Command, the Army Headquarters that had oversight for the RCB deployments, issued instructions on the conduct of the RCB. An example from 1979 details the "Pre-Deployment Security Training" to be conducted by the company, including training that would need to be done at Butterworth itself, including:

> "c. appreciation of the enemy threat and likely approaches;"[91]

66. Examples of training and briefing packages presented to each incoming company are at Appendix E. They demonstrate that updates on the "security situation" and "threat" were given to the arriving companies.

67. In the briefing for the RCB tour by C Company 2/4 RAR in 1979, the company was briefed that the Communists had been known to use mortars and that these could pose a serious threat to the base.[92] Three years earlier Australian government departments were discussing the withdrawal of the RAAF from Butterworth. The Department of Foreign Affairs said of the base:

> "We also have concerns about the security of the Butterworth base area and the possibility that it might become in time the subject of hit and run mortar or rocket attack by Communist guerrillas."[93]

68. Although Foreign Affairs believed that this possibility was "remote at present" they were not prepared to "rule out this risk altogether looking ahead".[94] As can be seen from para 56 above, Foreign Affairs were not the only agency concerned about such attacks.

69. RCB faced potential risk from armed Communist Terrorists in Malaysia up until the signing of the peace accord between the Communist Party and the Malaysian government in December 1989, which coincidently was when RCB's QRF role ended. Defence has conceded as much and the law, although complex, may at times be simple to determine:

> "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."[95]

70. Defence knows full well of the hostile threat to the base and that RCB did in fact encounter those belligerents on a number of occasions. This was confirmed in an email exchange of questions from an RCB veteran and answers from the Secretary of the Department of Defence in 2000:

> Question – "Is it true that land forces carried live ammunition due to the threat of Communist Terrorist (CT) attack during this period?"
> Answer – "Yes".

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[91] HQ Field Force Command, *Annex B to HQ FF Comd Staff Instr 2/79*, 6 July 1979, para 2c.
[92] Personal recollection of Mr Raymond Fulcher, Chair Rifle Company Butterworth Review Group.
[93] Fernandez, R.R., Acting Deputy Secretary, *RAAF Presence in Butterworth: FAD/28*, File No. 696/6/4/5, para 3.
[94] Ibid.
[95] Mohr R.F., R*eview of* S*ervice* E*ntitlement* A*nomalies in* R*espect of* S*outh*-E*ast* A*sian* S*ervice 1955-75*, February 2000, p9.

Question – “Is it true that Australian intelligence reports (currently held in archives) indicate several incidents involving CT and Australian troops?”
Answer – “Yes”.”[96]

71. In a letter from the VCDF, Admiral David Johnston, to Mr Ken Marsh the VCDF reiterates a recurring refrain that Defence does not consider that the “…potential threat posed by communist terrorists was above a low level…”[97].

72. The insistence by Defence of categorising the threat (danger) to RCB as “low” and therefore not worthy of being categorised as warlike is in direct contradiction to the Federal Court of Australia’s determination on categorising “danger” to service personnel:

> “In applying such a provision, therefore, it is desirable to eschew the use of adverbs and adjectives, that is to say, not to read into the provision words which are not there. In referring to the word "danger", Administrative Appeals Tribunals have used adjectives such as "real", "actual" and "substantial". But the word "danger" stands for itself. If a serviceman incurs danger from hostile enemy forces, that circumstance is sufficient to satisfy the statutory requirement. It is indeed the specified requirement. No adjective can enlighten that concept. When applying the word "incurred", some Administrative Appeals Tribunals have used the expression "reasonable expectation". But, again, the word "incurred" is an ordinary word of the English language. It has a dictionary meaning and is used in that sense. Other words should not be substituted for it.”[98]

73. That Defence have disregarded the Federal Court ruling is reinforced when Vice Admiral Johnston said:

> “Qualifying service or warlike service is reserved for those who endured the most significant danger.”[99]

74. The use by Vice Admiral Johnston of the adjectival phrase “the most significant” to qualify “danger” disregards the Federal Court’s injunction not to use adjectives to “enlighten” the concept of “danger”.

75. Vice Admiral Johnston erroneously uses this qualifying adjective to find that:

> “The service of Australian forces at Butterworth, during the period 1968 to 1989, cannot be classified as equivalent to the extant warlike service classification as members did not incur danger from hostile forces.”[100]

76. Vice Admiral Johnston makes this claim after confirming that there was a danger from hostile forces:

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[96] Duffield, C.J, *Secretary Site feedback*, email, 11 August 2000; and Hawke, A., *Secretary Site feedback*, email, 4 September 2000.
[97] Johnston, D., Vice Chief of the Defence Force, Letter addressed to Mr Ken Marsh, EC19-006588, 16 December 2019.
[98] Davies, Wilcox and Foster JJ, *Repatriation Commission v Walter Harold Thompson [1988] FCA 212*, para 8.
[99] Johnston, D., Vice Chief of the Defence Force, Letter addressed to Mr Ken Marsh, EC19-006588, 16 December 2019.
[100] Ibid.

> "In the case of ADF service at Air Base Butterworth during the period 1968 to 1970 [sic], there was no identified threat above low level from hostile forces to Australian forces."

77. The statement above contradicts Vice Admiral Johnston's earlier statement in his letter confirming that the requirement for warlike service is that personnel "…incurred danger from hostile forces…".

78. The threat may have been low (it varied over the years), but as the Federal Court of Australia has reiterated on a number of occasions:

> "If a serviceman incurs danger from hostile enemy forces, that circumstance is sufficient to satisfy the statutory requirement."[101]

79. This approach is also apparent in the direction from Cabinet to Service Chiefs in 1965:

> "…personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces…".[102]

80. Vice Admiral Johnston further confirms the danger to Butterworth when he highlights that the Ground Defence Operations Centre (GDOC) at Butterworth "…was activated on a regular basis…" including "…in response to potential threats to the Air Base…".[103] That is, the GDOC was activated under the Shared Defence Plan because it was considered that the base could be subject to imminent attack.

81. It is not just Vice Admiral Johnston who has confirmed that RCB faced danger from hostile forces. Defence have said numerous times that there was a threat to the base from armed communist terrorists. In 2014 for instance, Defence advised Parliament that "No attempt has been made by Defence to conceal the fact that there was a level of threat to RAAF Butterworth, but the level of threat was assessed as low."[104]

82. Vice Admiral Johnston's assertion that "…the Australian Government did not consider the ADF at Butterworth were vulnerable to attack..."[105] is put in question by a recently uncovered document from 1976:

> "Action has recently been taken to construct revetments to give some protection to the Australian aircraft at Butterworth against attack."[106]

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[101] Davies, Wilcox and Foster JJ, *Repatriation Commission v Walter Harold Thompson [1988] FCA 212*, para 8.
[102] Cabinet Minute, Decision No, 1048, Submission No. 834, *Principles on which Eligibility for War Service Homes Loans is determined and the Consequences of their continued application on the Demand for Loans – Examination and Report by Inter-departmental Committee*, Melbourne, 7 July 1965, Recommendation 1.
[103] Johnston, D., Vice Chief of the Defence Force, Letter addressed to Mr Ken Marsh, EC19-006588, 16 December 2019.
[104] Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.
[105] Johnston, D., Vice Chief of the Defence Force, Letter addressed to Mr Ken Marsh, EC19-006588, 16 December 2019.
[106] Attached to: AUSTEO The RAAF Presence at Butterworth, Para 21, attached to Hamilton R.N, A/First Assistant Secretary Strategic and International Policy Division, Review of Butterworth Deployment, 22 October

83. If the ADF were not vulnerable to attack at Butterworth, why were revetments constructed to protect ADF aircraft from attack? Such revetments could not have been constructed without Australian Government approval and in consultation with the Malaysian Government which owned the base.

84. Vice Admiral Johnson does not explain what he means by "the most significant danger" but other Defence officers have indicated what level of danger they consider necessary to meet the incurred danger test thereby qualifying for warlike service:

- "…we tend to look at what happened before that [1993] in terms of having a gun in your face or dodging bullets…"[107]
- "… the highest level of service is warlike service… this is similar to tanks driving over barbed wire in combat, with Infantry throwing grenades at each other… the others who sit around doing nothing, behind the lines should be on Hazardous service [Non-warlike Service]…" (Appendices F & G).
- "It is reasonable that an operations centre would be manned in instances of possible threat to the base. Note that the manning was on the basis of 'possible ground threat' and not 'expected attack'."[108]

85. None of these three explanations, nor Vice Admiral Johnston's "most significant danger", accords with Australian law in relation to "incurred danger" that it "… need only be possible, not probable, nor does it have to eventuate"[109].

86. In 2011, NOSB provided the Nature of Service Review Board (NOSRB) with a number of documents containing evidence that RCB met the incurred danger test:

> "The role of the RCB was to provide a quick-reaction force to meet the communist terrorist threat, and be responsible for internal security within Butterworth Base."[110]
>
> "The operational threat to ADF personnel at Butterworth was from communist terrorists under Chin Peng. The threat existed until December 1989 when Chin Peng signed a peace accord with the Malaysian Government. Defence personnel were tasked with local defence of the base."[111]
>
> "In that there had been ongoing threat of CT activity in the general Butterworth area and West Malaysia, a defensive contingency plan was raised and brought into effect as RAAF Butterworth Operation Order No 1/71 (Op Order), *Shared Defence of Air Base Butterworth*, of 8 S2ep 71."[112]

1976, Reference: DEF 270/1/4. NAA 696/4/4/5 Pt 3.

[107] Dave Webster, NOSB, Oral evidence to DHAAT for report *Inquiry into Recognition for Members of Rifle Company Butterworth for Service in Malaysia Between 1970 and 1989*, 18 February 2011, audio disc.

[108] Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014.

[109] DHAAT, *Inquiry into Recognition of Australian Defence Force Service for SpeciaL Air Service Counter Terrorist and Special Recovery Duties*, 22 December 2009, para 81.

[110] Defence, *RAAF Base Butterworth – ADF service at RAAF Base Butterworth, Malaysia, from 31 Mar to 31 Dec 89*, Summary para 3.

[111] Ibid., Assessment para 7.

[112] NOSB, Background Brief – Rifle Company Butterworth, 25 July 2011, para 45.

87. Unfortunately, neither NOSB nor NOSRB saw the import of these examples to the incurred danger test as it applied to RCB service. Nor did either body grasp the significance of the Ground Defence Operations Centre (GDOC) which was the command centre activated under the shared defence plan when the base was threatened.

88. NOSB advised NOSRB that in relation to GDOC:

> "As part of the recent review, NOSB examined all the Base Squadron Unit History Sheets for the period 1968 to 1986 and found no mention of an emergency activation."[113]

89. NOSB were provided with evidence from these same documents that the GDOC had been activated and manned due to "possible ground threat" at various times throughout the RCB deployment. NOSB dismissed this evidence thus:

> "It is reasonable that an operations centre would be manned in instances of possible threat to the base.
>
> Note that the manning was on the basis of 'possible ground threat' and not 'expected attack'."[114]

90. Here, NOSB disregard the threshold for the incurred danger test and demand a greater level of threat — "expected attack" — that is not supported by the findings of the Federal Court of Australia or various other Tribunal rulings. As Clarke J pointed out:

> "What should be emphasised is that the practice of focussing on 'imminent' risk of harm has led to inconsistency between decisions and reliance on fine points of distinction to justify decisions in cases where the factual circumstances are almost identical to those in an earlier case but the result is different.[115]

91. There were three security states under the Shared Defence Plan which mandated under what circumstances the GDOC was to be activated and the state of readiness of the entire RCB as a consequence. Those states were:

    1. Security Green (Cautionary): possibility of civil unrest or other trouble which may threaten the security of the air base.
    2. Security Amber (Alert): when it is known that a shared defence situation at Air Base Butterworth is imminent.
    3. Security Red (Emergency): when there is a severe threat to the security of the air base.[116]

92. The GDOC was activated at states Amber and Red. The RCB was brought to immediate readiness and the actions required of the RCB were identical for both Amber and Red

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[113] Ibid., para 55.
[114] Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014.
[115] Clarke J, *Report of the Review of Veterans' Entitlements,* 2003, para 11.52.
[116] Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014, para 3b

alerts.[117] The manning and activation of the GDOC for "possible ground threat" accords with at least the Amber alert level as the GDOC was not activated prior to this level being met. The RCBRG has multiple RAAF Base Squadron reports of the GDOC being activated in the face of "possible ground threat".[118] The Shared Defence Plan stipulated the impact on the GDOC of the various states of activation of the shared defence plan:

- Green: skeleton manned but not activated
- Amber: fully manned and activated
- Red: fully manned and activated [119]

93. A further security level was implemented by Australian authorities for when the Malaysian Armed Forces (MAF) were "…unable to meet their commitments within the provisions of Reference A [the Shared Defence Plan]…".[120] Security State BLACK was to be implemented as soon as MAF forces were withdrawn in part or whole from Butterworth.[121] Australian forces were then to be distributed around ABB to cover the positions vacated by the MAF.[122]

94. That Defence have failed to apply the incurred danger test in its consideration of RCB service is reinforced by comments made by then Minister Billson on whether RCB met the incurred danger test in his letter to then RCBRG Chairman, Robert Cross. Minister Billson said:

> "…the key issue is a judgement on the extent to which RCB personnel were exposed to the risk of physical and mental harm and whether or not it was sufficient to justify allotment for special duty…".[123]

95. The question is not the *extent to which,* but rather *whether* "RCB personnel were exposed to the risk of physical and mental harm". That is the threshold for meeting the incurred danger test.

96. Minister Billson went on to compare RCB service to that in Vietnam and other conflicts and found that since RCB was nothing like them it could not possibly be warlike service. He said:

> "By way of comparison, units that were allotted for duty in the same broad time period were fighting in South Vietnam and were engaged on operations in Borneo/Sarawak and other parts of Malaya. In these conflicts, Cabinet guidance to the Service Chiefs was clearly met before units were allotted for special duty. This is evidenced in part by the numbers of casualties suffered by the forces involved.

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[117] RMAF & RAAF, *Shared Defence of Air Base Butterworth, Operation Order No. 1/71*, 8 September 1971, Annex 6 to Annex C.
[118] National Archives of Australia, A9435, 75, Commanding Officers' reports – Monthly reports unit history sheets (A50) – Base Squadron, Butterworth, 1944 to 1988. **NOTE**: reports later than 1978 were still sealed at the time of the research.
[119] RMAF & RAAF, *Shared Defence of Air Base Butterworth, Operation Order No. 1/71*, 8 September 1971,
para 3c.
[120] Parker, I.S., OC RAAF Butterworth, Operation Order No 1/72, Fail-Safe Plan for Operation Order 1/71, HQ 12/49/Air, 20 April 1972, para 1.
[121] Ibid., para 3a and b.
[122] Ibid., para d.
[123] The Hon Bruce Billson, MP, Minister of Veterans' Affairs, Minister Assisting the Minister for Defence, *Letter to Mr Robert Cross, Chairman, RCB Review Group*, 4 October 2007, p.3.

Defence considers that to reclassify the activities of the RCB in Malaya from 1970 to 1989 as 'warlike', or comparable to other periods of special duty in the same region at the same time, would not be appropriate."[124]

97. This passage betrays a misunderstanding or disregard of the concept of incurred danger and how it is determined. Casualties have nothing to do with incurred danger – the danger does not have to be realised. The incurred danger test does not require a comparison of service between more and less intense conflicts. That Defence didn't "consider" it "appropriate" to reclassify RCB service because it was not like Vietnam service is immaterial. The only appropriate consideration for Defence is whether RCB service met the threshold for the incurred danger test—set out by Cabinet in Directive 1048 of 7 July 1965, conclusively determined by the Federal Court of Australia in numerous decisions and reiterated by various tribunals including DHAAT.

98. RCB met the criteria for "special duty" set down by the government in Cabinet Directive 1048 of July 1965. RCB faced a "potential risk" due to the danger posed by communist terrorists and other dissident elements and therefore met the incurred danger test. All that remains is for the proper paperwork to be completed and ADF personnel at Butterworth be retrospectively allotted as has previously occurred for South East Asian service (see para 36 above).

Rules of Engagement, use of force, the QRF & Defence v Offence

99. The written rules of engagement (ROE) applicable to RCB have been overemphasised by Defence and other agencies at the expense of other elements that must be considered in determining RCB service. These other elements include the actual state of affairs on the ground, the question of incurred danger, use of force and determining the actual reason that troops were deployed in the first place.

100. That the ROE have been overstated is supported by the opinion provided by Professor Dale Stephens CSM FAAL, Director of the Adelaide University Research Unit on Military Law and Ethics, at Appendix H. Overemphasising the ROE as Defence have done is not useful in determining the threat faced. As Professor Stephens states in his opinion "… there can only ever be a general relationship between the issued ROE and the actual threat level faced by deployed ADF members."[125]

101. Furthermore, by looking at the factual situation surrounding the deployment and not just the ROE Professor Stephens concludes that "…the threat level was objectively a high one…".[126] This view contrasts markedly with that of Defence which has consistently downplayed the level of threat faced by RCB.

102. Application of force *was* authorised at least by the Rules of Engagement (ROE) and the Shared Defence Plan[127]. Defence asserts that the ROE for RCB were "…defensive in

[124] Ibid.
[125] Stephens, D., *Rules of Engagement and Threat Levels re Butterworth Rifle Company Butterworth*, University of Adelaide, 14 June 2022, p 1
[126] Ibid., p 2.
[127] Parker, I.S., Air Cdre, *Shared Defence of Air Base Butterworth: Operation Order No. 1/71*, 8 September 1971.

nature and to be applied within the air base only."[128] They also claim that the ROE were "…defensive (peacetime) only…" and simply reflected ADF personnel's "…inherent right to use force in self defence including within bases in Australia…"[129] But that does not reflect the full extent of the force available to ADF personnel at Butterworth either in the ROE themselves or through other authorisations to use force. Nor does it reflect the 'inherent right to use force' in Australia, for which no ROE are issued, loaded firearms are not carried, and the use of excessive force (such as shooting trespassers) is unlawful.

103. It should also be noted that the ROE were couched in terms of sentries and patrols.[130] The QRF was neither of these but a reaction force designed to contain and eliminate any enemy penetration of the base (see para 111).

104. Air Base Butterworth was a protected place under Malaysia's *Protected Areas and Protected Places Act* 1959.[131] As such the rules of engagement authorised more than the level of self-defence that applies in peacetime:

> "If any person either enters the wire surrounding the Protected Place or is seen by you to be attempting to make his way through, over or under the wire or is in an area in which you suspect his presence to be unauthorised or is acting in a manner to arouse suspicion of unauthorised presence…"[132]

105. Sentries or patrols could fire on that person if they did not stop after three challenges.[133] Persons apprehended could also be shot if attempting to escape and after being challenged to stop twice.[134] That is, that a person could be shot even though they posed no immediate threat to either the sentry, property or other people. This is not 'defensive' in the sense that NOSB implies. It is standard procedure for conventional combat when in a defensive position to first challenge unknown persons approaching your position before shooting.

106. It must be remembered that the *Protected Areas and Protected Places Act* 1959 was enacted by Malaya because of the Malayan Emergency to protect certain places from infiltration and sabotage by Communist Terrorists. As such, any person exercising powers under this Act, as RCB did at Butterworth, was deemed to be conducting operations against the enemy. Nor is it surprising that the ROE authorised under that Act were nothing like the free-fire zones of Vietnam. Butterworth was located in a built-up area with the main north-south road running adjacent to the base. Kampongs (villages) were situated abutting the perimeter fence and rice paddies were nearby. Authorities were clearly cognisant of the need to constrain the use of force in such 'civilian-rich'

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[128] Department of Defence*, Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 54.
[129] Cooper, J, *Email advice on matters raised in Standing Committee on Petitions 19 Nov 14 hearing in Brisbane regarding reclassification of the service of Rifle Company Butterworth (RCB)*, Ref MA14-003886, 3 December 2014.
[130] RMAF & RAAF, *Shared Defence of Air Base Butterworth, Operation Order No. 1/71*, 8 September 1971, Appendix 5 to Annex C.
[131] Parker, I.S., Air Cdre, *Shared Defence of Air Base Butterworth: Operation Order No. 1/71*, 8 September 1971, para 5.
[132] Parker, I.S., Appendix 5 to Annex C to Air Base Butterworth Op Order No 1/71, 8 September 1971, para 14.
[133] Ibid.
[134] Ibid., para 15.

environments during less intense periods. None of this detracts from the fact that the ROE issued to RCB authorised the application of lethal force.

107. At the time Defence were well aware of the difficulties implicit in managing the base security:

> "All ranks are to be made aware through briefings and discussions of the difficulties and necessity for, identifying friend from foe. Although required to, many Malaysians who have access to the Air Base may not carry identity cards/entry passes and probably have only a vague awareness of authorized and unauthorized areas."[135]

108. Defence's insistence that the ROE were only "defensive" and could "be applied within the air base only" is not only wrong — they could be applied off base as well as part of the RAAF Family Protection Plan — they also imply that only 'offensive' action can constitute pursuit of "specific military objectives". This is reinforced by Defence's assertion that RCB could not "...be employed in operations outside the gazetted area of the air base."[136] Thereby implying that only offensive actions count for warlike service and that a defensive operation cannot be an operation against the enemy. This is not the view of the Federal Court. In *David Norman Ahrenfeld v Repatriation Commission* [1990] FCA 319 the court reviewed a decision of the Administrative Appeals Tribunal (AAT) that was claimed under the *Repatriation Act* 1920, but determined under the *Veterans' Entitlement (Transitional) Act* 1986. In that decision Einfeld J said:

> "The Tribunal's reasoning (p 5) was that 'actual combat' means 'offensive action' as opposed to 'passive defence' and that the applicant's service fell within the latter category. It seems to me, however, that the activities of armed forces personnel do not easily lend themselves to such a distinction. What in fact exists is a host of different activities, each of which contribute to the 'war effort', with varying degrees of proximity to defeating or frustrating the enemy."[137]

109. Einfeld J went on to say:

> "In my view, the correct definition of 'actual combat against the enemy' in the context of this Act is 'integral participation in or in activity directly intended for an encounter with the enemy'."[138]

110. Einfield J further said that relying on a distinction "…between 'offensive action' and 'passive defence' seems to me clearly to involve an error of law"[139]

111. RCB had the task of providing a counter-penetration and counter-attack force throughout the period of its service. These were offensive tasks designed to first contain penetration of the base perimeter by communist terrorists and then destroy any communist terrorist forces that penetrated the base. The authorised use of force by RCB

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[135] Williamson J.I., HQ FF COMD, *Staff Instruction No 2/79 General Instruction for the Australian Rifle Company at Air Base Butterworth*, 6 July 1979, Annex A, para 1.
[136] Department of Defence*, Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 54.
[137] *David Norman Ahrenfeld v Repatriation Commission* [1990] FCA 319, para 33.
[138] Ibid., para 47.
[139] Ibid., para 46.

cannot be described as “defensive only”. A 1975 Department of Air briefing that was classified Secret and described the task thus:

> “Ground defence and security of assets are achieved by a combination of military and police action:
>
> a. …. on-base ground defence arrangements are required to provide close defence of assets when attack is imminent and a specialist ground defence (or infantry) force capable of responding quickly to an attack, to relieve an over-run position and counter attack any groups which occupy positions on the base”.[140]

112. The tasks of RCB, particularly in its counter penetration/counter attack roles, provided in the first instance by its QRF, to “protect against sabotage or to react quickly to any attempted incursions by CT groups”,[141] or to “…meet the communist terrorist threat”[142] are clearly activities “…directly intended for an encounter with the enemy” and as such RCB was engaged in the ‘specific military objective’ of securing Butterworth from these threats.

113. Defence of Ubon airbase in Thailand 1965-1968 was determined to be warlike service by MAJGEN Mohr in his review of South East Asian Service. The defence of the Ubon airbase was comparable to the task undertaken by RCB at Butterworth. RCB’s QRF role was the same as that undertaken by the pilots that sat at the end of the Ubon runway awaiting an enemy incursion:

> “ ‘Alert State Five’ was not peacetime or garrison duty, nor was it a training exercise. ‘Alert State Five’ required that two fully armed aircraft be at the end of the runway with pilots in close presence, ready and able to be airborne within five minutes to engage an intruding aircraft with a view to its destruction, subject to identification or lack of it. The danger of casualties was clearly forecast. The question then remains as to whether or not this was ‘warlike’ or ‘non warlike’. Did the Squadron face an objective danger? Did they ‘incur’ danger? Even though no danger eventuated in the sense that there were no actual combat engagements, they were armed for combat and had been told by those who knew more of the situation that danger did exist and they must hold themselves in readiness to meet it, not at some indeterminable time in the future, but at five minutes notice.”[143]

114. While Ubon and RCB QRF service was similar, the RCB QRF operational environment was more intensive. While the Ubon pilots only operated in daylight hours, the RCB QRF was a 24-hour operation. The Ubon pilots’ enemy was based in North Vietnam but the RCB QRF’s was operating just beyond the airbase perimeter.

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[140] Department of Air, Brief for DCAS Concerning Security of Butterworth, undated, Ref 564/8/28, para 16.
[141] Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam,* addressed to ‘Minister’.
[142] Barrie, C.A., ADML CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, 10 April 2001, Ref. CDF 249/01.
[143] Mohr, R.F., *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, 2000, p73.

Official Documents

115. The RCBRG has amassed and analysed 850 primary and secondary documents in relation to RCB, including 217 ex-SECRET and 18 ex-TOP SECRET papers. More documents are added weekly as research continues. We know that there are missing documents referred to in documents we have and that missing or destroyed documents are not uncommon for the relevant period. We have also located evidence of official destruction of some relevant files. We also do not have access to any documents that are yet to be declassified. However, the material uncovered by RCBRG is comprehensive and strongly supports the position put forward by the RCBRG for warlike service and, as evidenced in the report of the recent New Zealand review, were regarded as cogent and compelling evidence as to the nature of the threat posed by the communist terrorists to the Butterworth airbase.

116. In denying the claim of RCB veterans, Defence places heavy reliance on official documents that purport to prove that RCB's deployment was for 'training purposes'. At the same time, they consider irrelevant any other official document that does not support the training proposition or indicates the *warlike* nature of the deployment. An example of the latter is that Defence has never referred to Defence Committee Minute 2/1973 which declared that RCB deployments could "be presented publicly as being for training purposes".[144]

117. The documents that Defence relies on can be seen in its Background Paper prepared by NOSB and dated 28 April 2014.[145] Other documents relied on to prove the *peacetime* categorisation insisted on by Defence include:

- Australian Joint Service Plan ASBESTOS, which stated:

  > "Under arrangements made between Australia and Malaysia, beginning in November, 1970 an Australian rifle company was deployed on monthly rotation from Singapore to Butterworth, with the purpose of providing an opportunity for training and developing further cooperation with the Malaysian forces and the elements of the RAAF at Butterworth."[146]
  >
  > and
  >
  > "The new rotational plan accords with Australian national policy of deploying troops overseas for training exercises."[147]

- Chief of the Defence Force Staff (CDFS) Directive:

  > "This CDFS Directive notes that the:

[144] Defence Committee Minute, *Five Power and ANZUK Arrangements and Withdrawal of Australian Battalion and Battery*, Minute No. 2/1973, 11 January 1973.
[145] NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014.
[146] Chiefs of Staff Committee, *Australian Joint Service Plan No. 1/1973 Plan Asbestos: Rotation of an Australian Rifle Company at Air Base Butterworth, Malaysia*, 14 August 1973, para 1.
[147] Ibid., para 2.

> …company is deployed on a rotational basis to provide an opportunity for training and to develop cooperation between the Malaysian Armed Forces and the Australian Defence forces…"[148]

118. The problem with relying on such 'official' documents to prove the case that RCB was in Malaysia primarily for training and cooperating with the Malaysian Armed Forces (MAF) is that they do not accord with the reality on the ground.

119. Defence's heavy reliance on Plan ASBESTOS to prove the 'training' scenario is further undermined by a 1974 Minute classified as Confidential – AUSTEO which shows that the 'training' deception of Plan ASBESTOS did not accord with the reality on the ground. The Minute states:

> "On 10 Oct 74 I spoke with Maj Ray Le Roy, SO2 …, DMO&P (Army) re the ARA rifle coy at BUT. He said that prior to Jul 74 the Army interpretation of AJSP 1/73 'Plan Asbestos' was that the coy was primarily in the area for training, incl training with the Malaysian Army. However, since that time the coy has had the security of Aust assets, property and persons at BUT as its primary task. But for political reasons it was not possible to state this in low security classification documents."[149]

120. Use of such official documents to prove that RCB deployment was for "training and cooperation" with the MAF is belied by correspondence originating at the Australian High Commission in Kuala Lumpur on precisely that point:

> "The only problem which emerged is the one which we have expected for quite some time and have reported on separately to another area in the Department of Defence. At present there is no regular program for battalions or parts thereof to engage in formal training exercises in the sense that we understand them in Australia. MINDEF officers lamented that notwithstanding their efforts to have at least one battalion continuously under training they as yet have been unable to achieve this objective. Furthermore, they were unable to foresee when such an objective was likely to be realised."[150]
>
> "Brigadier-General Abdullah said he is quite happy to co-operate with the Company troops but he warned that he did not see much prospect at present of engaging in combined exercises. He said his forces were committed to operational tasks and have little if any time available for training."[151]
>
> "We continue to experience difficulty in having MINDEF place any real importance or priority in arranging significant training with the Malaysian Army for the Butterworth Company. In recent discussions with the Director of Training (COL Daud) he again drew attention to some of the problems: insecurity of most training areas, their

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[148] NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 66.
[149] Brough, WgCmdr SRGD, *ARA Infantry Coy at BUT*, AUSTEO Minute Paper, 11 October 1974, para 1.
[150] Hoare, L.G., Group Captain, Service Adviser, Australian High Commission Kuala Lumpur, *Australian Company at Butterworth*, Ref 207/5/2, 18 September 1973, para 3.
[151] Hoare, L.G., Group Captain, Service Adviser, Australian High Commission Kuala Lumpur, *Australian Company at Butterworth*, Ref 207/5/14, 4 October 1973, para 2.

preoccupation with operational commitments, and the fact that they carry out little unit training as such, and the fact that their available training areas are becoming fewer…"[152]

121. For a small number of RCB companies there *was* ad-hoc training with Malaysian forces, but this usually took place before or after RCB duties were completed.

122. Despite this, there is another problem with Defence's reliance on 'official documents' and that was laid out by the DHAAT in a case virtually identical to the RCB submission. The DHAAT said in relation to the service of RAAF personnel at Ubon in Thailand 1965-1968:

> "The Tribunal has seen ample indication in the mass of documents relating to No. 79 Squadron's assignment to Ubon that indicates that there was sensitivity in Thailand and Malaysia about the role of the Squadron. The Vietnam War was a point of considerable contention among South-East Asian countries and there was a strong desire by some of them to avoid any appearance of commitment to either side in the conflict. References are common to Thai concerns about the role of Ubon as a support base for the USAF air war over Vietnam, Laos and Cambodia. The Australian documentation reflects these concerns."[153]
>
> "Whatever might have been said in the formal decisions relating to the retention of No. 79 Squadron in Ubon, it is clear that the real purpose of its posting was to assist the USAF air campaign against North Vietnam. There was no other reason for the Squadron to be there. Thailand was not under independent threat. The proposal was that the Squadron be returned to Australia when the threat to Thailand came to an end in 1965. It was in response to US requests that the Squadron was left at Ubon."[154]
>
> "The question therefore is whether, after 45 years, it is now possible to confront the reality of No. 79 Squadron's involvement in the Vietnam War. In the Tribunal's view it is time for it to be recognised that the Squadron was making a significant contribution to the air campaign directed against North Vietnam. It provided the protection of an important base on behalf of the USAF. This is how the US viewed what the Squadron was doing and the Tribunal considers that it is the correct view of the Squadron's actions."[155]

123. Malaysian sensitivity to the presence of 'foreign forces' has been outlined above, whatever might have been said in the formal decisions relating to RCB, its real purpose was to assist the MAF in its war against Communist Terrorists by providing protection of an important airbase that was being used by the MAF to mount operations against communist terrorists. RCB's role was integral the Malaysian war effort not least because its presence protected RAAF assets and personnel and the RAAF presence was important for the Malaysian's war effort:

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[152] Australian High Commission, Kuala Lumpur, *Training for Butterworth Compan*y, 14 March 1974, para 1.
[153] DHAAT, *Inquiry into Unresolved Recognition Issues for Royal Australian Air Force personnel who served at Ubon between 1965 and 1968, 18 February 2011*, para 52.
[154] Ibid., para 63.
[155] Ibid., para 66.

"It [RAAF] assists the RMAF in running the largest of the four RMAF bases in West Malaysia … Because of its location and size Butterworth is very important to Malaysia and its efforts to contain the CPM force, and the withdrawal of the RAAF, or any significant reduction in its size, would markedly reduce the effectiveness of the base and/or require large diversions of RMAF effort to Butterworth from other bases. The general level of achievement of the RMAF would drop if there was any large reduction in RAAF strength at Butterworth." [156]

124. The numerous vital points (VP) that RCB were tasked with protecting and which the QRF were trained to react to at a moment's notice were essential to the MAF's war effort and included fuel dumps, radar, missile loading bays and MAF aircraft.[157]

War or Emergency?

125. Defence has asserted there was no war or Emergency in Malaysia during the period of RCB deployments 1970-1989:

"No state of 'war' or emergency has existed in the Federal States of Malaysia since the establishment of the need in 1970 to deploy a duty rifle company at BUTTERWORTH. Professor David Horner at the Australian National University agrees that no military threat against the national interests of Malaysia has emerged since the cessation of hostilities with Indonesia (since Confrontation ended on 11 Aug 66).[158]

"No state of war or emergency existed in Malaysia during the period 1970 to 1989."[159]

"Because no state of war or emergency existed in Malaysia after the end of confrontation on 11 August 1966 and because the Malaysian government made no request to the Australian Government for military assistance after this date, ADF personnel were not engaged in duty relating to warlike operations or a state of disturbance in Malaysia between 1970 and 1989."[160]

"While the period of 1966 to 1989 has been referred to as the second emergency, this title appears to have been applied retrospectively – there is no historical record of the Malaysian government ever declaring a second emergency."[161]

126. Defence has maintained this position despite being provided with abundant evidence showing that both a war and an Emergency occurred, for example:

- The Malaysian Archives http://www.arkib.gov.my/en/web/guest/darurat-angkara-komunis which states that "This second armed rebellion forced a second state of

[156] 'Review of RAAF Presence at Butterworth', 10 Sept 1976.
[157] RAAF, RMAF, Air Base Butterworth Op Order No 1/71, 8 September 1971, Appendix 2 to Annex C.
[158] DHAAT, *Inquiry into Unresolved Recognition Issues for Royal Australian Air Force personnel who served at Ubon between 1965 and 1968, 18 February 2011*, para 81.
[159] Ibid., para 159(a).
[160] Robert, S., MP, Official Committee Hansard, House of Representatives Standing Committee on Petitions, *Petition on reclassification of service by the Rifle Company Butterworth 1970-89*, 29 October 2014.
[161] Ibid.

Emergency in Malaysia from 1968 to 1978". … "The guerrilla warfare triggered by CPM [Communist Party of Malaya] dragged on for 21 years."

- Books written by Malaysian government bodies about the war, the latest of which is *The Malaysian Army's battle against communist insurgency in Peninsula Malaysia, 1968-1989* by Sharom bin Hashim et al, published in 2001 by the Malaysian Ministry of Defence and available in the National Library of Australia: https://trove.nla.gov.au/work/16959056?selectedversion=NBD24193292

- The article by Ong Weichong and Kumar Ramarkrishna, *The Forgotten Insurgency That Failed*, as well as many other papers and books by Ong Weichong.

- The UNHCR's *refworld* http://www.refworld.org/docid/3ae6b5604.html which is one source of the Malaysian legislation titled *Ordinance No. 1 of 1969, Emergency (Essential Powers) Ordinance* which was proclaimed on 15 May 1969 and stated in part "WHEREAS by reason of the existence of a grave emergency threatening the security of Malaysia, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong under Article 150 of the Constitution", it then goes on to give effect to a range of emergency powers.

- The 1969 Act was not allowed to simply tick along however but was renewed by the *Emergency (Essential Powers) Act 1979*, an example of which is at <MY_Emergency_Essential_Powers_Act.pdf> and states "WHEREAS a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong on 15 May 1969 under Article 150 of the Federal Constitution: AND WHEREAS Parliament by reason of the Emergency considers it necessary to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance 1969, and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after 20 February 1971, and for the validation of all acts and things done under the said Ordinance or under any subsidiary legislation made or purporting to have been made thereunder."

- The Malaysian Chief of the Defence Force greetings to RCB on its 50[h] anniversary (Appendix A).

127. Although Defence hold to their position of no war or emergency, it is not supported by research conducted under the auspices of the Australian War Memorial (AWM) and published in their journal *Wartime* in 2019. There, AWM historian Michael Kelly explains:

> "Chin Peng fled to China, from where he would foment a second Malayan Emergency that broke out in the late 1960s. This second emergency lasted until 1989, at which point, with the collapse of communism in Russia and Europe, Chin Peng realised his dream of a communist Malaysia was over. A formal surrender by the communists was signed on 2 December 1989 at Hat Yai in Thailand."[162]

[162] Kelly, M., *Saving a Domino*, AWM *Wartime* Issue 86, 2019, page 50.

128. The VCDF, Admiral David Johnston, wrote to Cathy McGowan AO, MP on 26 April 2019 in response to correspondence from her regarding my claim for *warlike* service.[163] In that letter the VCDF contradicts the Defence claim, maintained since 2004, that "No state of war or emergency existed in Malaysia during the period 1970 to 1989."[164] The VCDF instead acknowledges the declaration of a state of emergency on 15 May 1969, stating that it was in regard to "…Sino-Malay sectarian violence."[165] He then claims that "There was no use of emergency powers…in relation to communist terrorists or insurgents".[166]

129. However, the VCDF's claim does not stand up to scrutiny when the historical record is examined, for instance:

> "By October [1975], the Government had to revive the harsh emergency regulations to isolate the guerrillas: a "Home Guard" obliging all males from 18 to 55 to carry out local patrols, special courts for suspected terrorists with relaxed rules of evidence."[167]
>
> "In September 1975 the Malaysian Prime Minister, Tun Razak, described the recent resurgence of communist guerrilla activity in Peninsular Malaysia as "The New Emergency"…"[168]
>
> "First it has gradually reintroduced counter-guerrilla measures that proved effective in the Emergency years….And, under the Essential (Community Self-Reliance) Regulations, 1975, security laws have been tightened and special courts set up to try suspected terrorists".[169]
>
> Both the special courts[170] and "Home Guard"[171] regulations, for instance, were promulgated under the May 1969 State of Emergency legislation that Defence now acknowledges to exist, but claims wasn't used against terrorists.

130. To support its position that there was no war or emergency, Defence has claimed that life at Air Base Butterworth and in the surrounding areas went on as normal during the period, with free movement and no curfews or other restrictions.[172] The evidence however, such as that from the *Straits Times,* shows otherwise:

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[163] Johnston, D., Vice Chief of the Defence Force, Letter to Ms Cathy McGowan AO, MP regarding reclassification of Rifle Company Butterworth service for the period 1970-1989, PDR ID: EC19-002341, 26 April 2019.
[164] NOSB, *Background Paper Parliamentary Petition Dated 3 March 2014 Rifle Company Butterworth 1970-1989*, 28 April 2014, para 159(a).
[165] Ibid.
[166] Ibid.
[167] Dyer, G., *The Malaysian Emergency: Act 2, Scene 1 begins*, The Canberra Times, 5 March 1976, p2. National Library of Australia http://nla.gov.au/nla.news-article110806729.
[168] Stubbs, R., *Peninsular Malaysia: The "New Emergency"*, Pacific Affairs, Vol 50, No 2 (Summer, 1977), p 249
[169] Ibid., p259.
[170] Government of Malaysia, *Essential (Security Cases) Regulations* 1975, https://www.refworld.org/docid/3ae6b5604.html.
[171] Government of Malaysia, *Essential (Community Self Reliance) Regulations* 1975, https://www.refworld.org/docid/3ae6b5604.html.
[172] For instance see: Department of Defence, *2011 Nature of Service Branch Review of ADF Service at Butterworth 1970-1989*, 14 October 2011; Griggs, R.J., Vice Chief of the Defence Force, Letter to RCB veterans, April 2018.

- March 1971 – communist terrorists (CTs) dynamited the railway bridge spanning Sungei Jarak, two miles from the northern Province Wellesley village of Tasek Glugot (9 March 1971).

- April 1971 – two bombs exploded in Penang. Communist banners were found on the island and in Province Wellesley and arrests were made (24 April 1971).

- June 1971 – Malaysia Prime Minister Tun Abdul Razak named Penang as one of five states where the communist threat was 'very real' (29 June 1971).

- October 1974 – communist flags and banners were found in five Penang villages (29 October 1971).

- May 1975 – CTs bombed two railway bridges at Berapit and Permatang Tinggi near Bukit Mertajam, Province Wellesley (11 May 1975).

- September 1975 - three districts of Butterworth were placed on a five hour curfew from midnight till 5 a.m. as a 'direct consequence of the establishment of the Inter-state Security Committee' (14 September 1975).

- September 1975 – suspected communist agents were held during a house-to-house search during curfew hours in Butterworth (16 September 1975).

131. An ANZUK security assessment also noted that Malaysian Security Forces had "restricted road travel around the Gunong Bongsu Forest Reserve east of Kulim, and about 15 miles from the Base, an indication of official concern for the safety of military and civilian road traffic in an area of continuous CT presence" in November of 1971.[173]

132. In his 1978 book *Malaysia and Singapore: The Building of New States*, at page 181 Stanley Bedlington notes of Essential Regulations promulgated in 1975:

> "The Essential Regulations also provide for the establishment of a scheme called 'Rukun Tetangga' ("neighborhood association," or community self-reliance groups wherein all males between the ages of eighteen and fifty-five are compelled to participate in local security controls) and the organization of a vigilante group known as … the People's Volunteer Corps. Other internal security measures instituted to meet the guerilla menace include strict press censorship, increasing the size of the police force, resettlement of squatters and relocation of villages in "insecure" rural areas, and house-to-house sweeps for arms in urban areas."

133. These, and other instances, were not minor disturbances in an otherwise 'life as normal' Malaysia. A JIO report on a 1971 briefing from the Malaysian military advised that the Malaysians were asked whether they "…were experiencing the same problems with squatters that existed during the First Emergency."[174] Lt. Col. Ahmad bin Haj Abdul

[173] ANZUK Intelligence Group (Singapore), Note No. 1/1971, 30 November, 1971, *The Threat to Air Base Butterworth up to the End of 1972,* Singapore, 1971.
[174] JIO, *JIO Briefing for Assistant Services Adviser*, 8 November 1971.

Kadir responded that "…the problem did exist and that every endeavour was being made to relocate the squatters."[175]

134. Defence has made many claims since 2006 to justify its insistence that no war or emergency existed at the time of RCB deployments, i.e.;

- Families were present so it couldn't be warlike.[176]
- There was no war or emergency in Malaysia after the Indonesian Confrontation
- There was free movement around the country and no curfews
- Life went on as normal

These Defence claims have been disproven with evidence, but this nit-picking approach of Defence to deny RCB warlike service has been instrumental in perpetuating an injustice against RCB veterans. As Justice Clarke said:

> "What should be emphasised is that the practice of focussing on 'imminent' risk of harm has led to inconsistency between decisions and reliance on fine points of distinction to justify decisions in cases where the factual circumstances are almost identical to those in an earlier case but the result is different."[177]

135. In making its determination, the Tribunal should eschew such an approach and consider the totality of the evidence. The weight of that evidence clearly leans towards a finding of warlike service for RCB. If the Tribunal applies the principles enshrined in the *Australian Veterans' Recognition (Putting Veterans and Their Families First) Act* 2019 then it should support the reclassification of RCB service to warlike. As MAJGEN Mohr said:

> "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."[178]

Conclusion

136. In para 41 above, the concerns of Australian authorities about the vulnerability of ABB are discussed. In order for Malaysia to effectively conduct its operations against the CT it needed the RAAF presence and that presence, and the base, required protection. Australian authorities decided that the appropriate protection was an Australian rifle company providing a QRF. This level of combat force was considered the most effective

[175] Ibid.
[176] Miller, A., Assistant Advisor, Letter to Mr Robert Cross, Welfare Officer 8/9 RAR Association on behalf of Minister Assisting the Minister for Defence, 5 September 2001.
[177] Clarke J, *Report of the Review of Veterans' Entitlements,* 2003, para 11.52.
[178] Mohr, R.F., Kennedy, P.G.N, and Bloomfield, T*., REVIEW OF SERVICE ENTITLEMENT ANOMALIES IN RESPECT OF SOUTH-EAST ASIAN SERVICE 1955-75*, February 2000, p 10.

in the circumstances of protecting an airbase against insurgent forces as providing a large static defensive perimeter was not considered viable:

> "CT operations are particularly insidious from a defensive viewpoint. The terrorist has freedom of movement in the civil community, a reasonably wide choice in the selection of targets and types of weapons or nefarious explosive devices which can be used to attack or sabotage personnel, assets and facilities. The defensive penalty in the face of these kinds of threats is the diversion of large numbers of security force personnel to counter possibility of CT attacks. To ignore the threat of attack is to risk an extremely high loss in terms of assets with attendant military ignominy and in terms of political, psychological gains for the CTO."[179]

137. RCB service should be recognised as warlike with the appropriate medallic award and repatriation benefits. RCB meets the criteria for warlike service that existed at the time of its deployment. The principles espoused by both MAJGEN Mohr and Justice Clarke in regard to incurred danger are applicable to RCB service. RCB was tasked with securing the Butterworth Airbase against attack from communist terrorist forces led by Chin Peng.

138. The RCBRG asks the Tribunal to recommend:

- That service at Butterworth between 1970 and 1989 be classified as warlike service under the Veterans' Entitlements Act 1986
- That service at Butterworth between 1970 and 1989 be awarded with the AASM with clasp Malaysia

Raymond Fulcher
Chair Rifle Company Butterworth Review Group
Rifleman, 7 Platoon, C Coy 2/4 RAR, deployed to Butterworth February – May 1979
Ph: [redacted]
Email: [redacted]

15 June 2022

Appendices

Appendix A	Malaysian Chief of the Defence Force greetings on RCB 50th anniversary
Appendix B	Analysis of Cabinet Directive 1048 and interdepartmental report
Appendix C	Aerial photo of Airbase Butterworth showing enemy attack routes
Appendix D	Statutory Declaration by G.R. Penney
Appendix E	Training and briefing package
Appendix F	Statutory Declaration of P. Copeland
Appendix G	Statutory Declaration of R.C. Williams
Appendix H	Opinion of Professor Dale Stephens

[179] Butterworth Security. N.P. McNamara, AVM, DCAS. 564/8/28. 14 October 1975.


50th Anniversary
RIFLE COMPANY BUTTERWORTH
Malaysian Armed Forces (MAF) congratulates Rifle Company Butterworth (RCB) for its 50th anniversary of establishment in Malaysia.
Your presence and sacrifice here in Malaysian soil in protecting the RMAF Butterworth base during the resurgence of the communist insurgency in 1970-1989 was a remarkable contribution and had always been the highlight of your presence here in Malaysia.
Since then, the cooperation and the desire to further develop the friendly relations continue to grow, in preparing for more challenging future ahead.
May the long historical defence collaboration between MAF and Australia Defence Force will further strengthen and expand beyond the bilateral scope and more importantly under the auspices of the Five Power Defence Arrangements and the Malaysia Australia Joint Defence Program in providing a better future for the subsequent generations.
GENERAL TAN SRI DATO' SRI HJ AFFENDI BIN BUANG RMAF
CHIEF OF DEFENCE FORCE
AUSTRALIAN RIFLE COMPANY BUTTERWORTH
21 NOV 1970 - 2020
ATM
OFFICIAL MEDIA SOCIAL

Cabinet Directive 1048, the Interdepartmental Committee & Allotment for Special Duty

1. Cabinet's intent of giving *clear* direction to the Services in Cabinet Directive 1048 cannot be ignored. The first half of the directive is unambiguous as to when ADF personnel should be allotted under the SOS Act, it can be applied to *any* deployment under the Act at *any* time. The second half is linked to a particular set of "present circumstances" clearly articulated in the directive: Indonesian infiltrators and communist terrorists, the latter being then confined to the Thai border area.

2. These were not the circumstances that RCB confronted at the time of its ongoing deployment to Butterworth. Indonesian infiltrators had not been an issue since 1966 and Chin Peng's communist terrorist forces were no longer confined to the Thai border. Attacks had occurred throughout the peninsula, including in Kuala Lumpur and at military bases, 1975 saw rocket attacks on Kuala Lumpur airbase and Minden barracks Penang, mines and booby traps were ubiquitous throughout the peninsula, the communist 8th Assault Unit was within striking distance of Butterworth, communist attacks had occurred in close proximity to the base and Malaysian forces had conducted operations in the area.

3. For Defence to contend that the second part of Cabinet Directive 1048 survived the circumstances it was meant to address denies Cabinet's *clear* intent to limit it to a particular set of circumstances, and therefore time, with its wording of "in the present circumstances".

4. All that was required for RCB to operate in defence of Butterworth was either the invitation or consent of the Malaysian Government.[180] This was provided with an Exchange of Notes in 1971 and previous treaties and agreements between Australia and Malaysia and, at times, other nations.

5. A government department is not empowered to reinterpret the clear wording of government decisions. Defence's reliance on its interpretation of the second half of Cabinet Directive 1048 to deny the claims of RCB veterans cannot therefore stand. That leaves only the first half of the directive, essentially the incurred danger test, to determine RCB's nature of service, and on that matter Defence have repeatedly confirmed that RCB did incur danger from hostile forces or dissident elements.

6. Defence contend that Cabinet Directive 1048,[181] which gave direction to the Services on when to allot personnel for special duty under the Repatriation (Special Overseas Service) Act 1962 (SOS Act), required that a host country must first request Australian assistance before ADF personnel could be considered to be giving '*warlike'* service.

[180] Southeast Asia Collective Defense Treaty (Manila Pact); September 8, 1954, Article IV para 3.
[181] Cabinet Minute, Decision No, 1048, Submission No. 834, *Principles on which Eligibility for War Service Homes Loans is determined and the Consequences of their continued application on the Demand for Loans – Examination and Report by Inter-departmental Committee*, Melbourne, 7 July 1965, Recommendation 1.

7. Directive 1048 stated:

> "…that the Services be directed that allotment for "special duty" should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces or dissident elements; in the present circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to Indonesian infiltrators or communist terrorists in circumstances where there has been a specific request for the assistance of Australian forces and where the task has been clearly defined…"[182]

8. In 2007, Defence argued that this directive meant that:

> "In essence, allotment was only to be made where the host nation had requested assistance and Australian troops were called out to conduct operations against Indonesian infiltrators or communist terrorists."[183]

9. Defence consider that this request is the *essential* criteria under the SOS Act for the *entire* period of its operation from 1962-1986. For example, in relation to Rifle Company Butterworth 1970-1989 (RCB), Defence refers to the lack of an invitation by the host country on numerous occasions:

> "There does not appear to be any specific request from the Malaysian authorities for the RCB to conduct operations against CT operating in the area of the Butterworth Airbase…"[184]

> "While Australian forces remained in Malaysia following the Confrontation ceasefire on 11 August 1966, the Malaysian government made no further requests for assistance in security operations. Accordingly, Australian forces were not engaged in any operations against hostile forces or dissident elements."[185]

> "As the Malaysian Government made no requests to the Australian Government for assistance in operations against communist terrorists, ADF personnel were not engaged in duty relating to warlike operations, or the state of disturbance in Malaysia between 1970 and 1989."[186]

10. Defence considers that the first part of Directive 1048, essentially the incurred danger test, could *only* be activated after an invitation from a host nation between 1962 and

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[182] Cabinet Minute, Decision No, 1048, Submission No. 834, *Principles on which Eligibility for War Service Homes Loans is determined and the Consequences of their continued application on the Demand for Loans – Examination and Report by Inter-departmental Committee*, Melbourne, 7 July 1965, Recommendation 1.
[183] R.J. Gillespie, VCDF, Minute, *Request for Nature of Service Review of Rifle Company Butterworth (RCB) Service 1970 to 1989*, Ref: B660823, 28 August 2007, Attachment A, *Background to Review of Rifle Company Butterworth Nature of Service*, para 16.
[184] Ibid., para 34.
[185] Cooper, J, Ministerial Correspondence, *Reclassification of service by the Rifle Company Butterworth (RCB) 1970-1989 – Standing Committee on Petitions*, Ref R17785070, 25 May 2014, para 10.
[186] Cooper, J., *Meeting Brief: MINDP Meeting with Rifle Company Butterworth Research Group, 4.30pm Tuesday 27 November, Ministerial Talking Points*, 21 November 2019, dot point 7.

1986, and, if Defence were being consistent, presumably *only* if the enemy faced by that host nation were either Indonesian infiltrators or communist terrorists. This would mean that Cabinet placed the question of the nature of service squarely in foreign hands. Defence therefore contend that the Australian Government abrogated its sovereignty in this regard for 21 years.

Cabinet's Use of Plain English

11. Defence's interpretation of Cabinet Directive 1048 is not supported by the documentary evidence or the context of the directive's implementation. The report of the Interdepartmental Committee of 1965 consisted of several complementary documents related to the creation of Cabinet Directive 1048. Those documents demonstrate that Defence's interpretation of the directive is not supportable.[187]

12. Cabinet was advised that:

> "…while there is no need to amend the relevant legislation to express more clearly Parliament's intention as to the kind of service which should be designated as "special duty" there is a need for a clear directive from Cabinet regarding the ingredients to be taken into account…"[188]

13. Defence's interpretation of Cabinet Directive 1048 is only possible if Cabinet can be said to have given a *clear directive* by using unnecessarily oblique language. That is, for Defence's interpretation to hold they would need to show that when Cabinet said "in the present circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to Indonesian infiltrators or communist terrorists…" what they *actually* meant was "at all times, regardless of circumstances, allotment should therefore be confined to personnel specifically allotted for duty in relation to an enemy of any description".

14. But this goes against Cabinet's intention to give a *clear directive*. Had Cabinet meant to say 'at all times and any enemy' they would have said it, they did not. As the rest of Cabinet Directive 1048, and its accompanying documents are in plain English, it is clear that when Cabinet said "in the present circumstances", they meant "in the present circumstances". That is, exactly the circumstances then pertaining and no others.

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[187] McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965; Bury, L.E.H. & McKellar, G.C., *Principles on which Eligibility for War Service Homes Loans is Determined and the Consequences of their Continued Application on the Demand for Loans – Examination and Report by the Interdepartmental Committee*, Submission No. 834, June 1965; Prime Minister's Department, Notes on Cabinet Submissions Nos. 833 & 834, 6 July 1965; Cabinet Minute, Decision No. 1042, 7 July 1965; Daffy, R.J.P., et. al., *Report of Inter-Departmental Committee Appointed to Examine the Principles Relating to Eligibility for War Service Homes and Repatriation Benefits and the Consequences of their Continued Application on the Demand for Loans*, 27 May 1965; Cabinet Minute, Decision No. 1048, 7 July 1965.

[188] Bury, L.E.H. & McKellar, G.C., *Principles on which Eligibility for War Service Homes Loans is Determined and the Consequences of their Continued Application on the Demand for Loans – Examination and Report by the Interdepartmental Committee*, Submission No. 834, June 1965, para 8(a).

15. Cabinet meant precisely what it said in plain English, without the need for interpretation or extrapolation. To do otherwise would be to defeat their own purpose of *clarity*, as they were aware of:

> "…the difficulty facing the Services in making precise comparisons in the varying circumstances of service, both in respect of their own Service and in respect of comparable service in the other Services…"[189]

16. The phrase 'in the present circumstances' is a common enough expression so that Cabinet would have known that it was referring to a time-limited and particular set of conditions. For instance, the Macquarie Dictionary defines '*present'* as "being, existing, or occurring at this time or now" and '*circumstances'* as "the existing condition or state of affairs surrounding and affecting an agent".[190] It is clear that in using this particular formulation that Cabinet did not intend the second part of its directive to survive beyond the expiration of the circumstances it refers to.

17. It is necessary therefore to determine what those "present circumstances" were. Fortunately, they are provided in some detail within the documents relating to Cabinet Directive 1048.

Cabinet Directive 1048 and the Indonesian Confrontation

18. Australia was reluctant to become involved in the Indonesian Confrontation due in part to fears that the conflict could spread to the Papua New Guinea border. Despite repeated requests over two years from the British and Malaysian governments, Australia did not consent to involvement until January 1965.[191]

19. At the time:

> "…an area in Malaya along the Thai frontier…and the areas, including 50 miles seaward, of Sarawak, Sabah and Brunei [East Malaysia] have been declared special areas…"[192]

20. Cabinet then determined that:

> "the whole of the Malayan Peninsula (including Singapore) and adjacent waters be declared a special area…"[193]

21. Eligibility for repatriation benefits for those serving in the newly expanded special area was to be confined to personnel:

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[189] Daffy, R.J.P., et. al., *Report of Inter-Departmental Committee Appointed to Examine the Principles Relating to Eligibility for War Service Homes and Repatriation Benefits and the Consequences of their Continued Application on the Demand for Loans*, 27 May 1965, para 10.
[190] Macquarie Concise Dictionary, Seventh Edition, 2017.
[191] Australian War Memorial, *Indonesian Confrontation 1963-1966*, https://www.awm.gov.au/articles/event/indonesian-confrontation
[192] McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965, para 1.
[193] Cabinet Minute, Decision No. 1042, 7 July 1965, para (a).

> "…specifically allotted for special duty in relation to Communist terrorists in the border areas already prescribed and Indonesian infiltrators."[194]

22. Most of Malaysia was unaffected by either Communist terrorists on the Thai border or Indonesian infiltrators who were almost exclusively confined to East Malaysia. Having declared the entire Malaysian peninsula a special area (presumably to account for any escalation of the conflict beyond the border areas), Cabinet had to ensure that repatriation benefits were targeted at those personnel who incurred real danger. Hence, Cabinet's direction to limit benefits to those engaged in areas where there was a known enemy presence – the Thai border, East Malaysia and wherever else Indonesian infiltrators operated. In the event, there were two minor incursions into West Malaysia by Indonesian forces in September and October 1964, against which Australian troops operated.[195]

23. The inter-departmental committee that recommended the wording of what became Cabinet Decision 1048 was clear on what was to be achieved when it said that:

> "…an important ingredient is that there should be a real element of present danger from hostile forces. In this regard it noted that in providing for similar circumstances in the Repatriation Act, the definition 'theatre of war' contains a direct reference to 'time of danger'"[196]

24. The definition in the Repatriation Act cited approvingly by the Committee is reproduced in Attachment B of the report and states:

> "'Served in a theatre of war' means served at sea, in the field or in the air, in naval, military or aerial operations against the enemy in an area, or on an aircraft or ship of war, at a time when danger from hostile forces of the enemy was incurred in that area or on that aircraft or ship of war by the person so serving."[197]

25. This document demonstrates that both the Interdepartmental Committee and the Cabinet were concerned with ensuring that repatriation benefits were allocated to those facing a real danger. This was understandable as Cabinet had made the entire Malaysian peninsula and Singapore a special area. However, with 90% of Malaysia at peace and unaffected by hostile forces, Cabinet needed to ensure that only those who actually incurred danger received the entitlements.

26. These are the "present circumstances" referred to in Cabinet Directive 1048 and why it confines allotment to "duty in relation to Indonesian infiltrators or Communist terrorists", as these were the hostile forces in Malaysia at the time capable of endangering Australian forces. That is, the remnants of Chin Peng's communists confined to the Thai border area and Indonesian forces operating in East Malaysia but with the possibility of either to expand.

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[194] Ibid., para (b).
[195] Australian War Memorial, *Indonesian Confrontation 1963-1966*, https://www.awm.gov.au/articles/event/indonesian-confrontation
[196] Daffy, R.J.P., et. al., *Report of Inter-Departmental Committee Appointed to Examine the Principles Relating to Eligibility for War Service Homes and Repatriation Benefits and the Consequences of their Continued Application on the Demand for Loans*, 27 May 1965, para 10.
[197] Ibid., Attachment B.

27. The requirement for a "…specific request for the assistance of Australian forces and where the task has been clearly defined"[198] must also be seen on the context of the "present circumstances". Having become reluctantly involved, Australia was there to *assist* the Malaysians as required. They were not to plan their own overall campaigns against the hostile forces but aid the Malaysians in areas where the Malaysians required that assistance. Who better to know where that help was needed than the Malaysians themselves, hence the requirement for a specific request.

28. So, the interdepartmental committee and the Cabinet, crafted a document to ensure that in a country largely at peace the Australian Services could readily identify when personnel would definitely incur danger within the special area and so be eligible for repatriation benefits. But neither the committee nor the Cabinet left the matter there.

The Primacy of Incurred Danger

29. It is clear from the documents that neither the committee nor Cabinet considered "a specific request for … assistance", nor even "allotment", as the fundamental element in their consideration of this issue. Rather, they considered that whether ADF personnel had in fact "incurred danger" was the paramount question to be answered. Defences' contention that a request MUST be made before warlike service could be made out did not hold true even in 1965.

30. In 1965 Defence considered that:

> "…personnel engaged in operational tasks outside Australia including those in Malaya or any other prescribed 'special area' not specifically allotted for 'special duty' who become involved in warlike operations or a state of disturbance, should be eligible for repatriation benefits, as if they were engaged on 'special duty' in a 'special area'…"[199]

31. Senator McKellar, Minister for Repatriation at the time, was clear that the primary concern was that ADF personnel who incurred danger from hostile forces should be recognised regardless of a declaration of a 'special area'. Though he considered the SOS Act, in general, to be a "satisfactory and workable machinery", Senator McKellar also considered that it did not "adequately cover all the situations which can arise":[200]

> "…it does not provide for the contingency that an action (e.g., on the Thai frontier) may spill over beyond the declared area, or that personnel may become casualties from hostile action whilst going to or from a declared area…Crews of R.A.N. warships and support craft stationed in the Malayan area may also become involved in operations outside declared areas. Further, there is the real possibility that personnel of all three Services not allotted for special duty, whether they are within a special area or not, may unexpectedly become involved in isolated incidents."[201]

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[198] Cabinet Minute, Decision No. 1048, 7 July 1965, Recommendation 1.
[199] McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965, para 2(c).
[200] Ibid., para 4.
[201] Ibid.

32. The Senator went on to support a proposal to extend the SOS Act to "…cover personnel who in fact become involved in warlike operations and suffer death or incapacity in consequence, though not at the time allotted for special duty in a declared special area…".[202]

33. Cabinet agreed and declared that:

> "other personnel engaged in operational tasks outside Australia including those in Malaya or any other prescribed 'special area' not specifically allotted for 'special duty' who become involved in warlike operations or a state of disturbance should be eligible for repatriation benefits if they are incapacitated or killed in any area outside Australia as the result of action by an enemy or in combating an enemy."[203]

34. That Cabinet had 'incurred danger' uppermost in mind and considered that personnel who were engaged in like actions should receive like recognition regardless of "allotment" or "request" is evident from Cabinet's handling of Recommendation 3 of the interdepartmental committee's report.

35. Recommendation 3 was an attempt to align war service home loans entitlements with repatriation benefits for situations identified in Senator McKellar's submission, where service outside Australia, whilst not "allotted" was "…operational service against hostile forces…"[204] and so attracted repatriation benefits.

36. Cabinet resolved to set aside Recommendation 3 for further examination because:

> "…Cabinet saw the possibility that this would exclude some cases which if felt had strong claims to be considered eligible for war service homes. It considered, by way of illustration, the cases of two servicemen who were engaged in the same action; one being allotted for 'special duty', the other being 'on operational service against hostile forces'. In the event that neither suffered death or incapacity, the former would be eligible for repatriation benefits and a war service home while the latter would be eligible for repatriation benefits but not for a war service home."[205]

37. These documents reveal three important aspects of the government's intent in 1965:

    1. The concept of Theatre of War and the incurred danger test were paramount and to be applied to the SOS Act.
    2. Where the incurred danger test was satisfied it overrode any requirement for allotment or 'request'.

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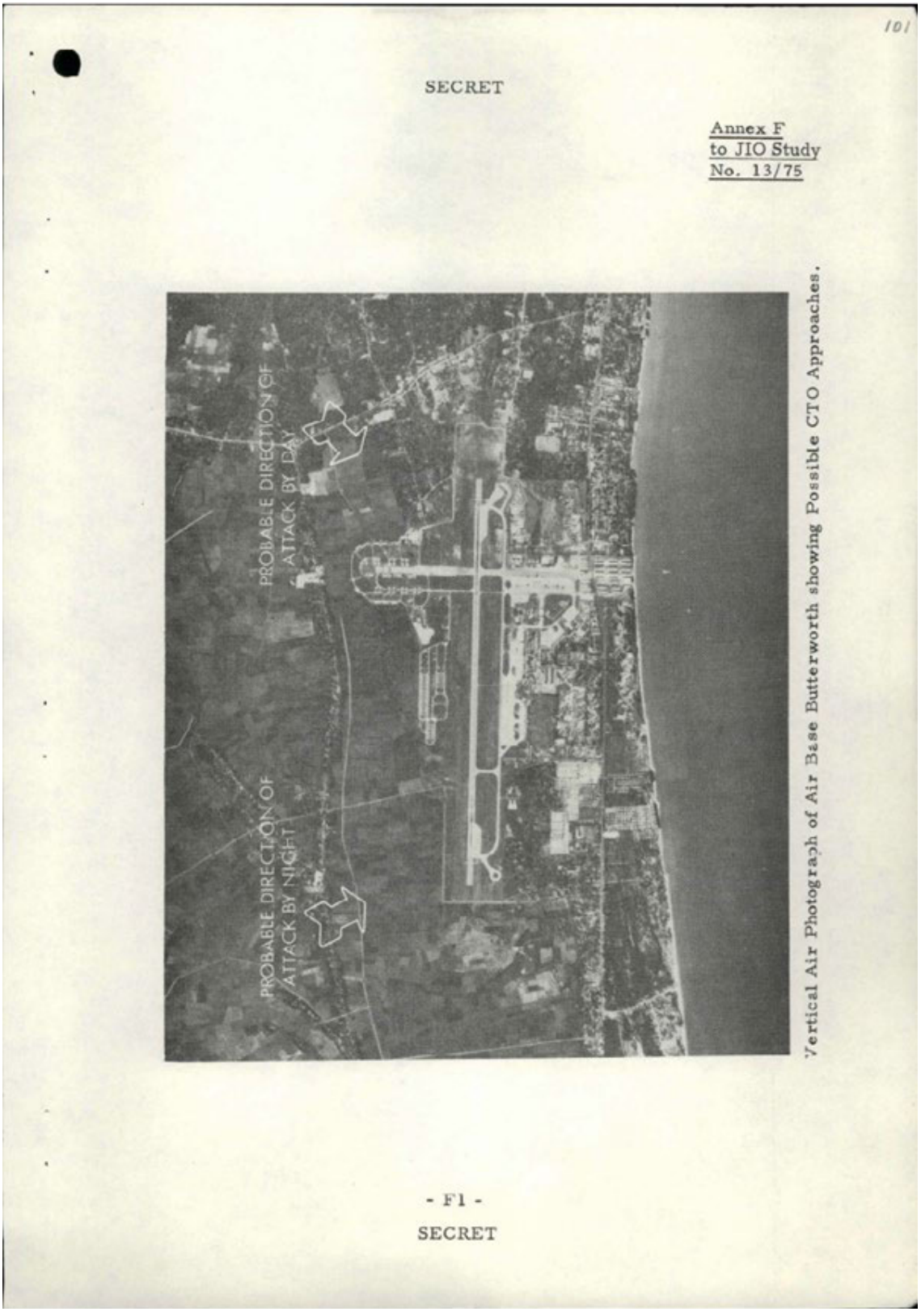
[202] Ibid., para 8.
[203] Cabinet Minute, Decision No. 1042, 7 July 1965, para (b).
[204] Bury, L.E.H. & McKellar, G.C., *Principles on which Eligibility for War Service Homes Loans is Determined and the Consequences of their Continued Application on the Demand for Loans – Examination and Report by the Interdepartmental Committee*, Submission No. 834, June 1965, para 9.
[205] Cabinet Minute, Decision No. 1048, 7 July 1965, para 2.

3. Actual circumstances ultimately determined qualifying service, not a policy document meant to guide prospective rather than retrospective determinations of service.

38. It is clear that neither the inter-departmental committee nor the Cabinet of 1965 were as inflexible on the question of recognition of service as those currently tasked with reviewing past service. Defence's inflexible application of what it mistakenly insists to be the policy of the time renders it incapable of dealing with what Senator McKellar described as the "novel problems"[206] of the nature of service for ADF personnel in South East Asia during that period.

39. It is clear from the preceding that the intention of Cabinet was to provide for those ADF personnel who incurred danger from hostile forces or dissident elements. By insisting on the primacy of the second part of Cabinet Directive 1048, Defence defeats the intent of the policy. Equity makes a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.[207]

[206] McKellar, G.C., Senator, Minister for Repatriation, *Repatriation Benefits for Members of the Forces Serving in South-East Asia*, Submission No. 833, June 1965, para 3.
[207] *Parkin v Thorold*, CA 1 May 1852, at 701.



/01/

SECRET

Annex F
to JIO Study
No. 13/75

PROBABLE DIRECTION OF ATTACK BY DAY

PROBABLE DIRECTION OF ATTACK BY NIGHT

Vertical Air Photograph of Air Base Butterworth showing Possible CTO Approaches.

- F1 -

SECRET

Joint Intelligence Organisation, *The Security of Air Base Butterworth, JIO Study No. 13/75*, October 1975, Annex F.

Oaths Act 1867

Statutory Declaration

QUEENSLAND
TO WIT

I, GARY RICKMAN PENNEY

of [redacted] in the State of Queensland

do solemnly and sincerely declare that

The four page statement attached as Annex A is a true and accurate description of the facts as I know relating to the hostile threat posed to RAAF Airbase Butterworth, Malaysia, by Communist Terrorists during the period 02 December 1979 to 02 December 1981 inclusive.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act 1867.

Signature of declarant/deponent

Taken and declared before me at [Location] BUDDINA QLD

this 16 TH day of OCTOBER 2021

A ~~Justice of the Peace~~/Commissioner for Declarations.

COMMISSIONER FOR DECLARATIONS
QUEENSLAND JUSTICES ASSOCIATION
Reg No: 49955

ANNEX A
TO STATUTORY DECLARATION
BY GARY RICKMAN PENNEY
DATED 16 OCTOBER 2021

STATEMENT BY GARY RICKMAN PENNEY WGCDR (Retd.)

My name is Gary Rickman Penney and I reside at [redacted]

I served as a Ground Defence Officer in the Royal Australian Air Force (RAAF) from March 1970 until retirement as a Wing Commander in April 2004 after 34 years of service. During my period of Service, I was posted to RAAF Base Butterworth in Malaysia and served as the Base Ground Defence Officer from 02 December 1979 until 02 December 1981. My role as the Base Ground Defence Officer was to plan, control and coordinate the ground defence of the base from possible hostile threats. My tasks also included, but not limited to:

- Liaison with Local Malaysian Police
- Liaison with other Local Malaysian Emergency Services
- Liaison with local Malaysian Armed Forces (primarily Royal Malaysian Air Force (RMAF) and Royal Malay Regiment (RMR)
- Liaison with local Police Field Force Units
- Briefing Rifle Company Butterworth (RCB) Command Elements on each rotation (generally 3 monthly) on Base ground Defence requirements and their role and tasks within the ground defence of the base
- Briefing RAAF new arrivals (including dependants) on each monthly rotation of personnel
- Training RAAF base ground combatant forces drawn from RAAF personnel stationed at Butterworth.
- Conducting bi-annual base ground defence training exercises that involved ground defence elements provided by RAAF, RMAF, RCB, and RMR forces in location at Butterworth.

On my arrival at Butterworth, I attended strategic and tactical intelligence briefings provided by the Senior Base Ground Defence Officer as well as the RMR Battalion Commander based at Sungai Petani (town located 40 minutes' drive north of Butterworth), and the local Police Field Force(PFF) Commander based at Kulim (town 30 minutes' drive east of Butterworth). Each of those briefings, conducted in the two weeks after my arrival 02 December 1979, provided up-to-date information on the level and nature of the threat posed to the base, assets and base personnel from Communist Terrorists (CT) known to be active in Malaysia at that time. *I was left in no doubt that the CT did pose a real threat to RAAF Base Butterworth; the threat did not include a large-scale attack, rather smaller acts of interdiction and terror aimed at interrupting airbase operations and gaining propaganda to support their cause.* These were assessed as being actioned through off-base direct and indirect fire weapons, or penetration of the base defences by small groups to attack vital points e.g., aircraft, fuel, ammunition/bomb storage, aircrew, aircraft maintenance facilities,

personnel quarters, navigational aids, command posts etc. A prime target was the 5 nations Integrated Air Defence System (IADS) that was Headquartered at Butterworth.

During my time at Butterworth, the RAAF personnel and their dependants averaged 3000-3500 in number. Butterworth was home to two squadrons of RAAF Mirage Fighter aircraft (approximately 28 aircraft), a Transport Support Flight of 1 Caribou aircraft and earlier on a DC3 Dakota. In addition, the RAAF included a Maintenance Squadron and a Base Squadron. The RMAF had 1 Squadron of F5 Fighter aircraft (approximately 14 aircraft), 1 squadron of Nuri Heavy Lift Helicopters and one Squadron of Alouette Helicopters, a Base Squadron, a Maintenance Squadron and a Handau Squadron (now known Pasukan Khas TUDM (Abbr.: PASKAU; 'RMAF Special Forces'). Defence Force personnel from Australia, New Zealand, Britain, Malaysia and Singapore also comprised the Headquarters of the 5 nation Integrated Air Defence System (IADS).

To maintain an awareness of the local tactical ground situation, I was required to attend regular intelligence briefings at Sungai Petani throughout my posting at Butterworth. During those briefings I was kept aware of CT activity throughout Malaysia at that time. CT were active in the Betong Salient and down into the mountain spine of Malaysia. with several contacts and subsequent engagements occurring between CT and RMR/ PFF elements. This activity continued on and off throughout my posting tenure. At that time RMAF air elements were prosecuting operations from Butterworth against CT forces near the Thai Border using both helicopter and fighter aircraft.

To counter the above CT threat to Butterworth airbase, the RAAF and RMAF maintained several elements at Butterworth as a defensive deterrent. The RMAF kept a Squadron sized unit of RMAF Handau permanently at the base to provide perimeter security and vital point protection. The RAAF maintained a ground defence cadre of 1 Squadron Leader Ground Defence Officer, 1 Flight Lieutenant Ground Defence Officer, 1 Sergeant Airfield defence Guard and 2 Corporal Airfield defence Guard tasked to man and operate the Base Ground Defence Operations Centre (GDOC) and control and coordinate the ground defence of the airbase. Further, the RAAF maintained two 30-man Flights of base combatant personnel (BCP) who were trained and skilled in ground defence as a secondary duty. All other RAAF personnel were required to attend weapon training at least twice per year to become proficient on all types of RAAF Ground Defence weapons: 9mm Pistol, 9mm F1 Sub Machine Carbine, 7.62mm L1A1 Self Loading Rifle and the 7.62mm L2A1 Automatic Rifle. This training was far in excess of what RAAF personnel were required to undertake on Australian Bases at that time and was reflective of the perceived ground threat to the Butterworth airbase at that time. The RAAF also maintained a RAAF Police Section for airbase security and security of RAAF personnel and their dependants off-base. Along with the RAAF Police, a section of RAAF Police Dogs and their handlers, maintained flight line security during stand down hours and during heightened periods of threat. It must be emphasised, that the level of ground defence training received by RAAF personnel at Butterworth, and their employment as part of the base ground defence operations, was at a much higher level than

that reflected at any airbase in Australia at that time. The ammunition usage authorised for the continuation training of RAAF personnel was far above the allocation to any base in Australia. The number and types of weapons held within the armoury at Butterworth was on a scale much higher than any base in Australia at that time. Further, the Ground Defence cadre was significantly larger than that expected to be in place at bases within Australia.

The RCB at Butterworth were garrisoned on base and as part of their complex they were provided with armoury and ammunition storage facilities within their area. On arrival at Butterworth, the Company Commander and Company 2i/c were fully briefed by both me and the Senior Ground Defence Officer on their unit's role and tasks for the ground defence of the base. They were comprehensively briefed on the location, function and importance of each of the base's vital points. They were briefed on the rules of engagement (ROE) that were in force at the time i.e., challenge, re-challenge, and then take the appropriate action to prevent the threat from proceeding. This included at the highest level of engagement the firing of live rounds if the individual believed that firing live rounds was the only means by which they could prevent an attack on their life, someone else's life, or an attack from occurring against an airbase vital point. The RCB was required to maintain a 24/7 Quick Reaction Force (QRF) of Section Strength on 15minutes notice to move throughout their tenure at the airbase. The QRF was truck mounted and were required to carry first line ammunition of live rounds in taped magazines. A second line was carried on the vehicle to be used if required. The QRF was required to rehearse the various QRF counter attack and counter-penetration drills against various vital points at least twice (both day and night) during each 24-hour period of QRF duty. The responsibility for this activity was delegated to the Company Commander RCB.

To ensure RAAF personnel and their dependants, RCB personnel, and other Australian personnel employed by Defence (e.g., school teachers for the RAAF School Penang) were fully inducted into their new posting/attachment location, all were required to attend an induction briefing held in the Base Cinema one or two days after their arrival in Malaysia. Included in this induction was a presentation by the RAAF Base Ground Defence Officer on the nature of the threat presented to the base by CTs, and their roles and responsibilities as Servicemen and women within the ground defence of the base. This briefing was supported by the Base Intelligence Officer and the Base RAAF Police Officer. All new arrivals were made aware of areas that were unsafe to travel around Malaysia due to the possibility of attack, as well as preventative measures that they could employ to ensure their survival when faced with a threat. These briefings occurred on an average of one per month and continued throughout my tour of duty at Butterworth.

In summary, during the period between December 1979 and December 1981, Communist Terrorist (CT) activity presented a continuous threat to RAAF Airbase Butterworth assets and personnel. Various Australian and Malaysian Defence force units and personnel were deployed and tasked with the defence and protection of the airbase assets and personnel against those threats. Included within the Australian Defence Force contingent were RAAF

personnel stationed at Butterworth and an Infantry Rifle Company (Rifle Company Butterworth (RCB)) personnel who were deployed on 3-month rotation to provide quick reaction forces and defence against attack to vital assets and personnel. All Australian and Malaysian personnel were provided with Rules of Engagement which included use of lethal force. RCB units were issued with, and carried, live rounds when tasked with 24/7 Quick Reaction Force. I am without doubt that during my posting to Butterworth from 1979 to 1981, that a live threat to the base existed from hostile ground forces known as CT, that Butterworth Airbase was being used by the RMAF to mount missions against the CT, and that both RAAF and RCB personnel were at risk of attack and were trained, armed, equipped and rehearsed to counter such attacks.

Gary Penney

08 October 2021

Appendix E

5 RAR R910/5/5
DATED 7 DEC 71

A COY TRAINING SYLLABUS JAN 72 (BUTTERWORTH)

Serial (a)	Date (b)	Time (c)	Subject (d)	Reference (e)	Instructor (f)	Location (g)	Remarks (h)
1.	1-2 Jan 72	-	ARL	-	-	-	ARL ends 022400H.
2.	3-4 Jan 72	-	Return from ARL and prep for Butterworth.	-	OC	Kangaw	Advance party leaves 4 Jan 72.
3.	5-6 Jan 72	-	Main body en route to Butterworth by rail and road.	-	2IC	-	Stores to go with road party.
4.	7 Jan 72	0800-0900	Lecture by Base Provost Officer	-	DPO	Butterworth	
5.		0900-1000	" " GLO 65 GL Sect	-	GLO	"	
6.		1000-1200	Tour of RAAF/RMAF Butterworth	-	Pl Sgts	"	
7.		1300-1400	Base and Formation Standing Orders	-	OC/CSM	"	
8.		1400-1500	Lecture on Security Situation in Kedah/ Province Wellesley	-	GLO	"	
9.		1500-1600	PT	-	PTI	"	

5 RAR R910/5/5
DATED 7 DEC 71

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
22.	17 Jan 72	1500-1600	Pre Ex Admin	-	2IC	-	
23.	18 Jan 72	-	Fd Sigs - Sect/Pl Pmns - Scouts - Fire and Mov.	-	OC	Curan Area or Area X.	RTD 0800 3 days Cbt Rats.
24.	19 Jan 72	-	Contact drills - Obs Crossings	-	-	-	
25.	20 Jan 72	-	Harbour drills - daily routine Coy harbours.				
26.	21 Jan 72	-	Return to Butterworth and post ex admin.	-	-	-	RTB approx 1100 hrs.
27.	22-23 Jan 72	-	Weekend Standdown	-	-	-	
28.	24 Jan 72	0800-0900	PT	-	PTI	-	
29.		0900-1200	TaOEP & ETS	-	Pl Comds	CTA	
30.		1300-1500	Close Air Support	-	GLO	Lecture Room	
31.		1500-1600	Rules of engagement	-	Pl Comds	CTA	
32.	25 Jan 72	0800-1000	1 Pl - Coached Grouping 2 Pl - Organization 3 Pl - Claymore M18A1	- -	Pl Sgts CSM	25m Range Lecture Room CTA	
33.		1000-1200	1 Pl - Organization 2 Pl - Claymore M18A1 3 Pl - Coached Grouping		as above	as above	

ANNEX B TO
D COY 6 RAR
R 841/4/2
DATED DEC 72.

D COY TRAINING PROGRAMME, BUTTERWORTH- JAN/FEB 73

(a)	DATE (b)	TIME (c)	ACTIVITY (d)	INSTRUCTOR (e)	LOCATION (f)	REMARKS (g)
1	10 Jan - 13 Jan 73		Prepare for and move to Butterworth Ex "Mountain Stream"	OC	Kangaw	
2	Mon 15 Jan 73	0800 - 0900	Admin	All	Coy Lines	
3		0915 - 1000	Introduction to Butterworth Air Base	65 GL Sect	"	
4		1030 - 1115	Introduction to the RAAF	"	"	
5		1120 - 1200	Introduction to Butterworth/Penang	APM	"	
6		1300 - 1330	The Threat	65 GL Sect	"	
7		1330 - 1500	Base Defence Orientation		1. Ground Def office 2. 65 GL Sect	1. Key Personnel only 2. Remainder of Coy.
8		1500 - 1600	PT/Sport	PTI/Sports Off		
9	Tue 16 Jan 73	0800 - 1100	MIRAGE Introduction/Familiarsation	75 Sqn, RAAF	Airfield	
10		1100 - 1200	IROQUOIS "	"	"	
11		1300 - 1600	Orientation Butterworth/Penang	APM/65GL Sect	Town	

Instructions for completing a statutory declaration

Please complete the following form using the notes in the left-hand margin for guidance. More guidance on making statutory declarations can be found at www.justice.vic.gov.au.

When making the statutory declaration the declarant must say aloud:

I, *[full name of person making declaration]* of *[address]*, declare that the contents of this statutory declaration are true and correct.

Statutory Declaration

Insert the name, address and occupation (or alternatively, unemployed *or* retired *or* child*) of person making the statutory declaration.*

I, Paul Arthur Copeland of [redacted] Retired Soldier,

make the following statutory declaration under the **Oaths and Affirmations Act 2018:**

Set out matter declared to in numbered paragraphs. Add numbers as necessary.

Mr Raymond Williams and I met with a delegation of The Minister for Veterans' Affairs, Department of Veterans' Affairs and Defence to discuss the long ongoing matter of Mr Raymond Williams' case to have his service reclassified from Hazardous Service (Peacekeeping Service) to Warlike Service, as a result of his service in Beirut during the peak of the Lebanese Civil War 1983-1984.

Mr Williams and I went in the afternoon of the 11th of September 2019, to the Ministerial Wing of the Australian Parliament House, Canberra to meet with the aforementioned Delegation.

Toward the end of the meeting, Ms Jacqueline Cooper, the Director of the Nature of Service Branch, of the Department of Defence, when attempting to define Warlike Service and Non-Warlike Service conditions of service to both Mr Raymond Williams and I, stated the following:

"… the highest level of service is warlike service… this is similar to tanks driving over barbed wire in combat, with Infantry throwing grenades at each other… the others who sit around doing nothing, behind the lines should be on Hazardous service [Non-warlike Service]…"

I declare that the contents of this statutory declaration are true and correct and I make it knowing that making a statutory declaration that I know to be untrue is an offence.

Signature of person making the declaration

Declared at TORQUAY ***in the state of Victoria**

Place (City, town or

suburb)	
Date	on 27th May 2022
Signature of authorised statutory declaration witness	**I am an authorised statutory declaration witness and I sign this document in the presence of the person making the declaration:**
Date	on 27th May 2022
Name, capacity in which authorised person has authority to witness statutory declaration, and address (writing, typing or stamp)	JOSEPH ROBERT DIFFEN JP 18 DUMFRIES COURT. TORQUAY 3228 JUSTICE OF THE PEACE FOR VICTORIA REG. NO 12781 A person authorised under section 30(2) of the **Oaths and Affirmations Act 2018** to witness the signing of a statutory declaration.
The witness must only sign this section if the person making the statutory declaration is illiterate, blind or cognitively impaired and the statutory declaration is read to them.	**I certify that I read this statutory declaration to** *[name of the person making the statutory declaration]* at the time the statutory declaration was made.
This section must be signed by any person who has assisted the person making the statutory declaration, for example by translating the document or reading it aloud. If no assistance was required, this section does not need to be completed.	**I certify that I have assisted** *[name of the declarant]* by *[insert assistance provided, for example translating the document]*. Signed:
Date	On:
Name and address of person providing assistance	Name and address of person providing assistance:

Tasmania

Department of Justice

STATUTORY DECLARATION

OATHS ACT 2001

I (full name) Raymond Cyril Williams

Of (residential address) [redacted]

Occupation: Retired Soldier.

Do solemnly and sincerely declare that: Mr Paul Copeland and I had organised to meet with representatives of the Department of Veterans Affairs and Defence, namely the Nature of Service Branch (NOSB).
This meeting took place on the afternoon of the 11th of September 2019 at Parliament House in Canberra.
The purpose of the meeting was to discuss the long-drawn-out process concerning my case for reclassification of service, from that of Peacekeeping Service to Warlike Service because of my service in Beirut, from November 1983 to March 1984, during the peak of the Lebanese Civil War 1983 – 1984.

The discussions were rather 'robust' and the members of the NOSB delegation, Ms Jacqueline Cooper, and Lt Col Allan Black, were at odds to put their message across that my service was not warlike service, but Hazardous Service (Peacekeeping Service).
Prior to the end of the meeting, Ms Jacqueline Cooper, the Director of the Nature of Service Branch, of the Department of Defence, put forward her understanding and definition of Warlike Service and Non-Warlike Service conditions of service to both me and Mr Copeland, by stating the following:

"....the highest level of service is warlike service....this is similar to tanks driving over barbed wire barricades in combat with supporting Infantry throwing grenades at each other....the others who sit around doing nothing, behind the lines should only be on Hazardous service (Non-Warlike Service)....."

I make this solemn declaration under the Oaths Act 2001.
Declared at (place) LINDISFARNE IN TASMANIA

On (date) 29th MAY 2022

Signature

Before me

(Justice, Commissioner for Declarations or authorised person)

Steven John Collidge JP 5260
Justice of the Peace
Tasmania

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CRICOS Provider Number 00123M

14 June 2022

Mr. Ray Fulcher
Chair, Rifle Company Butterworth Review Group
[redacted]

Dear Ray

Rules of Engagement and Threat Levels re Butterworth Rifle Company Butterworth

I have been requested to provide my opinion on the correlation of issued Rules of Engagement ('ROE') to ADF elements and the significance this has regarding the assessment of threat levels in relation to the classification of 'war like' service. This question is asked in the specific context of the characterisation of service regarding the deployment of the Rifle Company Butterworth (RCB) during the period 1970 and 1989.

I do believe that I am able to render such an opinion as I am a Professor of Law at the University of Adelaide and am Director of the Adelaide University Research Unit on Military Law and Ethics. Additionally, I served as a permanent Naval Legal Officer for over 20 years and am currently a reserve Legal Officer in the ADF. This opinion is, however, rendered solely in my civilian professorial capacity.

The modern ADF ROE framework was largely developed in the 1990's and hence it is not always easy to draw doctrinal and even legal conclusions between the current framework and the context of what had occurred earlier. Despite this, many principles regarding ROE development have general application and can inform assessments occurring in the time period upon which you have asked me to provide this opinion. One of these key principles is that ROE are an amalgam of multiple influences, specifically legal, policy and operational considerations (ADDP 06.1, Edition 3, para 2.1). Hence, ROE must always be consistent with the law but may limit otherwise available legal actions because of policy or operational considerations (ADDP 06.1, Edition 3, para 2.4). Accordingly, irrespective of the characterisation of a conflict as an International Armed Conflict, or a Non-International Armed Conflict, issued ROE may always impose greater restraints on ADF members regarding scope of permissible actions. This means there can only ever be a general relationship between the issued ROE and the actual threat level faced by deployed ADF members.

During the period in question, it is clear from contemporary academic analysis (see for example, Thomas M Ladd, 'The Malayan Communist Insurgency', 4(5) *Asian Affairs* (May 1, 1977) 306) that all the criteria for Common Article 3 (to the 1949 Geneva Conventions) non-international armed conflict between insurgents and the armed forces of the Government of Malaysia were likely satisfied. Hence, the threat level was objectively a high one in relation to these activities. Notwithstanding this threat level, it was open for the Australian Government to have restricted the authority for deployed RCB personnel to the limits of self-defence 'only' for the purposes of ensuring base security. Such a position may merely reflect a decision of the Australian Government to assume more risk for its deployed members. There are several compelling reasons why this may have been the case, not least being respect and sensitivity to Malaysian Government concerns and priorities. Such a risk posture adopted in the ROE does not automatically mean, however, that ADF members were not facing a significant threat and hence undertaking 'war like' service for the purposes of internal Australian Government conditions of service.

By way of comparison, since the 1990's there have been multiple ADF deployments where the ROE posture has been restricted to self defence 'only' and yet were declared to be 'war like'. The most significant example of this was possibly the ADF deployment to Timor in 1999 (INTERFET) where all ADF forces were limited to personal self defence (and defence of others) under issued ROE. This framework was also applied when INTERFET transitioned to UNTAET in late 1999 and the self defence 'only' ROE foundation remained for all deployed ADF elements, yet the threat levels remained the same and this was also declared a 'war like' deployment.

I have been provided with information regarding the weapons state that applied during the RCB deployment, where live ammunition was chambered. I would note that having live ammunition chambered in weapons was also the weapons state that applied to ADF elements in Timor in 1999 and is a further indicium of the threat level, despite the self defence ROE 'only' applying.

Finally, my attention was drawn to Field Force Command Staff Instruction No. 2/79 dated 6 July 1979, that confirmed that section 54 of the then applicable version of the Defence Act applied to the RCB. Section 54 stipulates that such a deployment expressly occurred under the conditions of 'war like service' for the purposes of discipline, thus activating various offences that can only be charged when on 'war like' service.

In summary, it is my opinion that under general principles of ROE development, there is no necessary correlation between self defence 'only' ROE and an existing threat level. In fact, very significant ADF operations, where the threat level was very high, have been conducted solely on the basis of self defence 'only' ROE. Given this conclusion, coupled with the likely status of the armed conflict more generally (vis-à-vis the insurgents and the Malaysian State), the weapons state of the RCB and the activation of 'war like' provisions of the then Discipline legislation, I do believe that a determination that the RCB deployment was conducted on a 'war like' basis is very supportable.

I close by saying that I am happy to appear before the DHAAT if this is required to expand on any of the issues I have covered above.

Yours sincerely

Dr Dale Stephens CSM FAAL
B.A. (Flin.); LL.B (Hons)(Adel); GDLP (SAIT); LL.M (Melb.) LL.M (Harv.); SJD (Harv.)
Professor
Director – Adelaide Research Unit on Military Law and Ethics
Adelaide Law School