



**Rifle Company Butterworth Review Group
Rejoinder to the Department of Defence Submission
to the DHAAT Inquiry into RCB Service**

“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.”

MAJGEN Mohr, *REVIEW OF SERVICE ENTITLEMENT ANOMALIES IN RESPECT OF SOUTH-EAST ASIAN SERVICE 1955-75*, February 2000, p. 9.

Introduction

1. The purpose of this paper is not to address every point of the Defence submission as almost all of it has been addressed in the RCBRG submission. This paper will be limited to matters raised by Defence that were not addressed in the RCBRG submission, were incomplete, inaccurate, or were unreasonably omitted.
2. Why did Minister Gee call this inquiry rather than referring the request of RCB veterans back to the Department of Defence (Defence) as has been the norm in the past?
3. Following the announcement of the findings of the New Zealand (NZ) review RCBRG representatives attended a meeting with Minister Gee. The meeting was arranged by the Hon. Andrew Wallace MP who had been the Chair of the Coalition Defence and Veterans' Affairs Committee. Mr Wallace attended the meeting. Prior to the meeting the RCBRG provided the Minister with a brief, which addressed the implications of the NZ review.
4. At the start of the meeting Mr Wallace said the outcome of the NZ review was an opportunity to review RCB service. During the meeting the Minister said he was considering referring the question of RCB service to Defence. Mr Wallace expressed the opinion that bureaucrats were often reluctant to change long held positions.
5. The Minister then asked Mr Wallace how he thought the matter could be progressed. Mr Wallace explained that in his opinion there were two options:
 - The Minister could exercise his prerogative and reclassify RCB service; or
 - The Minister could order an independent inquiry.

6. That the Defence submission dismisses the relevance of the NZ review confirms the entrenched position taken by Defence over the past twenty years in relation to its opposition to reclassifying RCB service.

7. A previous Tribunal view of Defence's intransigence towards the reclassification of RCB service observed:

"The Tribunal acknowledges that the publicly enunciated purpose 'of providing an opportunity for further training and developing cooperation with the Malaysian forces and the elements of the RAAF at Butterworth' which was a convenient label for both the Australian and the Malaysian governments of the day may have created confusion as to the status of the company in later years, even within the Department of Defence itself."¹

8. Defence has claimed in its submission that:

"The practical effect of the New Zealand Reassessment is to align New Zealand with Australia in respect of medallic recognition of similar service in the period to 1 January 1974".²

9. Although the NZ report makes reference to various reviews of RCB service the report does not mention or recommend that New Zealand medallic recognition should align with Australia. On the contrary the NZ report is clear on the differences between the Australian and New Zealand awards and the fact that they cannot be "aligned":

"Veterans regularly cite the differences between Australian and New Zealand medallic recognition as justification for an award. Australia uses the Australian Service Medal (1945-75) and the Australian Service Medal (1975-2012) to recognise all non-warlike service in South East Asia. The two Australian Service Medals contain components of the New Zealand General Service Medal, the New Zealand Operational Service Medal and the New Zealand Special Service Medal, but also include service that is unlikely to be recognised by New Zealand such as nation building in Papua New Guinea 1945-75."³

10. The real "practical effect" of the NZ review is to provide recognition previously denied to NZ veterans by re-evaluating their service and having the moral courage to acknowledge that, in the light of overwhelming evidence, NZ had previously got it wrong.

Missing Elements

11. Before addressing some of the Defence statements it is important to consider what Defence has *not* included in its submission. There are two glaring omissions. The first is the incurred danger test which even Defence has previously stated was important to the consideration of RCB service:

¹ *Fulcher and the Department of Defence* [2020] DHAAT 08 (14 May 2020), para 39.

² Department of Defence, *Inquiry into medallic recognition for service with Rifle Company Butterworth, Department of Defence Submission*, July 2022, page 2 para 2 of un-numbered paragraphs.

³ 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 55.

“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.”⁴

12. The second is a failure to discuss the *principles* enunciated by Clarke and Mohr in their reports rather than simply regurgitating the findings of those reports. It is submitted that applying the *principles* of Clarke and Mohr to the abundant evidence on RCB service would yield a very different outcome to the one championed by Defence.
13. Both these issues are extensively covered in the RCBRG submission already submitted to the Tribunal.
14. Glaringly absent from the Defence submission is *any* discussion or analysis of the voluminous primary and secondary evidence that is available and has been provided to the Tribunal. Defence merely implies that it has done a lot of research by listing various categories of sources, such as the National Archives, that it has “researched”.
15. At para 1.4 and para 3.30 Defence repeats its insistence that the listed historical reviews are determinative of RCB service. Although Defence has repeated this argument and cited this list before, there is one notable difference. That difference is that Defence has removed from the list one review that they held just as reliable as those now listed in determining RCB service. That review was the NZ Government’s *Medallic Recognition Joint Working Group (MRJWG) on service in South-East Asia 1950-2011* published in 2013. That review was overturned by the current NZ review when the “...reassessment found that the MRJWG final report was missing some potentially critical information which may have reshaped some of its conclusions.”⁵ The “potentially critical information” is later indicated to be material from Australian archives that demonstrated that service at Butterworth was far from peacetime. This material was provided to the NZ veterans by the RCBRG. Australia’s Department of Defence had input into the 2013 NZ review and *should* have provided the “critical information” to NZ at that time. Whether it was withheld intentionally or in good faith it raises either the question of the integrity of Defence in relation to RCB or, on the other hand, puts a cloud over Defence’s claim to have exhaustively researched the RCB nature of service.
16. Regardless, rather than review its own reliance on the 2013 NZ review and consider what the “potentially critical information” that led to it being overturned means for its own veterans Defence simply removes the now compromised 2013 NZ review from its narrative.

⁴ 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.

⁵ 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 4.

Defence's "previous reviews" cant

17. This section will examine the reviews listed by Defence at paras 1.4 and 3.30 and demonstrate why they cannot be relied on as the determinative word on RCB service. NZ has taken the appropriate response to its own "previous reviews". Rather than seeing them as holy writ NZ have re-examined them in light of "potentially critical information" and as is known have *overturned* the "previous review" as deficient, rather than clutching to it to defend a clearly untenable position.

CIDA

18. The CIDA inquiry says very little about service at Butterworth, but what it does say indicates that it did not have access to the abundant evidence of the armed enemy threat posed by the Communist Terrorists to Butterworth now available. Concluding its two paragraphs on South-East Asia, including Butterworth, the Committee says "...therefore in terms of its Principle number 1, it does not recommend that this service be recognised through a medal".⁶ Principle 1 says, in part, that "Recognition of service by medals ... should only occur when that service has been rendered beyond the normal requirements of peacetime. Normal duties such as training and garrison duties should not be recognised...". The Committee does not define what it means by "garrison duties" but the explanatory text following Principle 1 says medals should be "...reserved for those who have done something special", a fairly vague concept. Principle 1 also says that medals should be reserved for "...military activities clearly and markedly more demanding than normal peacetime service".
19. Significantly, the review of RCB service in 2001 that awarded *non-warlike* service for February 1975 to December 1989 to RCB did not find Principle 1 a barrier to an award for RCB service. One of the recommendations of the review was that:

"In view of the conditions that existed in Singapore and Malaysia after the Indonesian Confrontation on 11 Aug 66 and until the end of FESR on 31 Oct 71, it is considered that duties in Butterworth are equally deserving of an award due to the terrorist threat which existed and the purpose of regional security. This is in keeping with CIDA principles."⁷

20. That is, a later review with more evidence found that the CIDA principles favoured RCB service.

Mohr Review

21. The Mohr review did not examine service at Butterworth beyond 1971 whereas the period of claim for RCB service begins in 1970 and ends in 1989. The Tribunal is referred to Defence Department Minute ref 2000-34836 Pt 1 where Air Commodore R.K. McLennan advised in relation to the Mohr review that "Consequently, service at

⁶ Gration, P, General, et al, *Report of the Committee of Inquiry into Defence Awards*, 1993, p. 45.

⁷ Australian Defence Headquarters, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, PE 2000-34836 Pt 1, dot point 7.

Butterworth between 1971 and 1989 was not considered".⁸ This limit to Mohr's investigation was confirmed by Defence in 2001 when it wrote that:

"However, the review only made recommendations in respect of service up to and including 30 October 1971, the end date of the Commonwealth Far East Strategic Reserve (FESR) in South-East Asia."⁹

22. Mohr's comments on Butterworth are found in Chapter 3, *Far East Strategic Reserve - Malayan Emergency* which ceased operations on 31 October 1971. On RAAF service at Butterworth Mohr said:

"One of the specific areas of ADF service the Review was asked to advise on was service at ... Butterworth. I have found it difficult to comment in such specific terms as such service ranged over almost all of the period covered by the Review and in particular two major conflicts, the Malayan Emergency and the Indonesian Confrontation."¹⁰

"Most, if not all, of the submissions received from personnel stationed at ... Butterworth concerned either their involvement in operations on the Thai/Malay border region or their non-allotment during the period of the Indonesian Confrontation. These sought either medal recognition for their service or repatriation benefits or a combination of both ..."¹¹

23. Importantly "Most, if not all, of the submissions ... concerned either ... involvement in operations on the Thai/Malay border region or ... non-allotment during the period of the Indonesian Confrontation".¹² The Confrontation ended in August 1966. There is therefore no evidence that Mohr considered service by RCB at all.

Clarke Review

24. The Clarke Review's bibliography has no reference to any of the primary documents provided to this Tribunal by the RCBRG.¹³ This is unsurprising because such bodies rely primarily on public submissions, relevant private organisations (veterans' groups), and briefings from government departments and entities to provide the evidence upon which to make a determination. This approach is detailed in both the Mohr and Clarke reviews.¹⁴ Realistically, a determined examination of archival documents by private bodies did not commence until the formation of the Rifle Company Butterworth Review Group (RCBRG) in 2006 so that the evidence uncovered by the RCBRG was unavailable at the time to the Clarke Review (or the Mohr Review or CIDA for that matter).

⁸ McLennan, R.K., Minute to Chief of Defence Force, *Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, 2000-34836 Pt 1, para 2.

⁹ Department of Defence, *Award for Service in South-East Asia 1955-1989*, DEFGRAM No 233/2001, 2 July 2001, p. 1.

¹⁰ The Hon R.F. Mohr, *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, February 2000, p. 32.

¹¹ *Ibid.*, p. 33.

¹² *Ibid.*

¹³ Clarke, J, *Report of the Review of Veteran's Entitlements*, January 2003, from p 869.

¹⁴ The Hon R.F. Mohr, *Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, February 2000, from p XXX; Clarke, J, *Report of the Review of Veteran's Entitlements*, January 2003, from p 59.

25. In making its recommendation on Butterworth, the Clarke Review gave as part of its reason that "...no specific armed enemy threat was present..."¹⁵ and that there was no "...threat from enemy action",¹⁶ yet Defence has since confirmed that such a threat was present in the form of Communist Terrorists – the very reason that RCB was deployed in the first place. It is clear that the Clarke Review did not have access to the abundant evidence of the armed enemy threat posed by the Communist Terrorists to Butterworth contained in the historical record.

Defence Review of RAAF and RCB Service (2000)

26. At para 1.4(c) Defence cite the recommendation of the CDF that led to service at Butterworth being *declared a non-warlike operation* for the purposes of the Australian Service Medal Regulations.¹⁷ This is the current ASM that RCB veterans are entitled to wear.
27. Defence have provided a copy of the CDF's recommendation in the group of papers included with its submission.¹⁸ This Minute does *not* support the Defence contention that RCB service was *peacetime*. On the contrary, the Minute, in particular its Background briefing is quite clear that RCB service was *not* ordinary peacetime service.
28. The Minute declares that the recommendation to award RCB the ASM "is in keeping with CIDA principles".¹⁹ Principle 1 of CIDA is discussed above and by invoking the CIDA principles the CDF agreed that RCB service had "...been rendered beyond the normal requirements of peacetime..." and that RCB veterans had been involved in "...military activities clearly and markedly more demanding than normal peacetime service". Nor did the CDF consider that RCB service was "...training and garrison duties..." as these are not conducive to CIDA Principle 1.
29. The CDF was also clear that the primary role of RCB was *not* training as Defence now insists:
- "In 1970, the Rifle Company Butterworth (RCB) was raised to provide a quick reaction force to meet the communist terrorist threat and provide internal security and protection for Australian assets within the perimeter of Royal Malaysian Air Force (RMAF) Base Butterworth."²⁰
30. A year earlier the A/CDF, LTGEN Mueller also found that "RCB service was to protect the base against terrorist insurgency."²¹

¹⁵ *Report of the Review of Veteran's Entitlements*, January 2003, para 14.138.

¹⁶ *Ibid.*, para 14.137.

¹⁷ Commonwealth of Australia Gazette, No. S230, 29 June 2001.

¹⁸ Barrie, C.A., CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, CDF 249/01.

¹⁹ *Ibid.*, Overview dot point 7.

²⁰ *Ibid.*, Overview dot point 2.

²¹ Mueller, D., A/CDF, *Implementation of the Recommendations of the Review of Service Entitlements Anomalies in Respect of South East Asian Service 1955-1975*, CDF 440/2000, Issues para 5.

31. If these findings by the CDFs are considered in the light of the Clarke and Mohr principles that placing ADF personnel in a position to react to a threat means that that service is operational and placing them in harm's way and danger then the Defence position of *peacetime* service becomes untenable.²² The CDF documents provided by Defence mitigate *against* a finding of *peacetime* service and lend greater weight to the RCBRG position of recognising RCB service as *warlike*. This is especially so once the incurred danger principle is applied to the CDF's findings.

The 2011 DHAAT Review

32. The 2011 Tribunal states that it received "...30 written submissions..." from individuals, groups and the Department of Defence.²³ None are included but it is assumed that the Defence submission was that presented by the VCDF. Whether those submissions covered identical ground to the RCBRG submission cannot be determined. However, this is not an insurmountable problem as the inquiry report states that:

"The evidence presented to the Tribunal by and on behalf of the claimants is not substantial. It consists of recollections of those who served with RCB of the arduous training which they undertook both before deployment to Butterworth and while they were there as well as descriptions of the detailed preparations and operational plans which were developed in anticipation of possible emergency situations."²⁴

33. It appears from this that none of the primary and secondary documentary evidence contained in the RCBRG submission to this Tribunal was made available to the 2011 inquiry in those written submissions.
34. The evidence primarily relied on by the DHAAT is contained in paras 51-54 of the report and constitutes 70% of the evidentiary discussion by the Tribunal. It consists of:

1. Prime Minister's Statement to Parliament dated 25 February 1969.²⁵
2. The Exchange of Notes between the Government of Australia and the Governments of Malaysia and Singapore in late 1971.²⁶
3. Letter from the Secretary, Department of the Army to the Secretary, Department of Defence, dated 19 May 1969, AWM200 R579/1/17G PART1.²⁷
4. A letter from the Chief of the General Staff to the commander of Far East Land Forces dated 23 May 1969.²⁸

²² See para 15 of the RCBRG Submission.

²³ DHAAT, *Inquiry into Recognition for Members of Rifle Company Butterworth for Service in Malaysia Between 1970 and 1989*, 18 February 2011, para 10.

²⁴ *Ibid.*, para 47.

²⁵ *Ibid.*, para 52.

²⁶ *Ibid.*, para 51.

²⁷ *Ibid.*, paras 52 and 53.

²⁸ *Ibid.*, para 54.

5. A staff instruction titled 'Infantry Company to Butterworth' issued by 28 Commonwealth Brigade on 22 October 1970.²⁹

35. So, the 2011 Tribunal relied primarily on **five** documents dated between 1969-1971 to determine the nature of service of RCB between 1970-1989 and *none* of those documents examine the situation *on the ground* during those years. The Tribunal also dismissed the input of veterans as "not substantial". By way of contrast, the RCBRG submission relies on **hundreds** of documents, including Top Secret and Secret, both high level official documents and assessments of the situation faced on the ground at Butterworth. The 2011 Tribunal's reliance on a mere **five** high level documents covering a two-year period in order to assess the nature of service of troops deployed over 19 years hardly seems adequate.

Fulcher and the Department of Defence

36. In both the Mitterer and Fulcher matters before the DHAAT Defence makes the point that in both cases it was found that the applicants' service:

"...has not been subject of a declaration by the Governor-General under the relevant regulations. Consequently he did not render service in a prescribed operation entitling him to this award."³⁰

37. But this is no answer to the question before the Tribunal of whether RCB service *should* be reclassified as *warlike*. That requires the examination of facts and evidence rather than the regurgitation of the findings of previous bodies. That is something that the Defence submission appears loathe to do.

38. The problem for the Defence narrative in the Fulcher matter is that in that case the Tribunal found that RCB service was *not* normal *peacetime* service:

"The Tribunal notes that service with RCB and by other ADF personnel at Air Base Butterworth between 1970 and 1989 has been recognised by the award of the ASM with Clasp 'SE ASIA'. The existence of this award is integral to the Tribunal's considerations because it means that such service has already been recognised as 'hazardous' and was therefore not rendered under ordinary peacetime conditions."³¹

39. The Tribunal went on to say that:

"In the current state, in accordance with the 2007 decision of the Minister for Veterans' Affairs, ADF service at Butterworth Air Base between 1970 and 1989 is considered as 'hazardous'..."³²

40. This Tribunal is referred to the Defence Honours and Awards website at <https://www.defence.gov.au/Medals/Tables/ASM-Clasps.asp#SEASIA> which correctly gives the dates for the award of the ASM relevant to RCB service as 14 February 1975 to 31 December 1989. Further, the *Declaration and Determination* (Gazette S64) of 28 Feb 2002, which is also on that site, declares the service for that

²⁹ Ibid.

³⁰ Department of Defence, *Inquiry into medallic recognition for service with Rifle Company Butterworth, Department of Defence Submission*, July 2022, para 1.24.

³¹ *Fulcher and the Department of Defence* [2020] DHAAT 08 (14 May 2020), para 32.

³² Ibid., para 42.

period to be “non-warlike operations” and not “hazardous” service as the Tribunal then supposed.

41. It is the case that then Minister Billson signed instruments determining RCB service to be “hazardous” or “non-warlike” in 2007. However, as Defence has made clear on numerous occasions this determination had no legal force because:

“...the Instruments had not been formally registered on the Federal Register of Legislative Instruments and consequently all service at Butterworth from 1966 (post Confrontation) remained classified as peacetime service.”³³

42. This means that in the Fulcher matter the Tribunal made a factual error and non-existent award “integral to the Tribunal’s considerations”.

43. The Tribunal said of RCB’s ROE that “...the ROE covered a situation which can be described as one of ‘extended self-defence’...”.³⁴

44. It would appear that “extended self-defence” is a wholly invented category by the DHAAT. It is unknown to former and serving members, some of whom have developed ROEs for operational deployment and is not contained in any relevant literature.

An unanswered question

45. Between paras 3.28 and 3.29 Defence posits a question that it leaves unanswered:

“Was service with Rifle Company Butterworth non-warlike in nature, or is the Australian Service Medal awarded because of Rifle Company Butterworth’s connection with non-warlike operations in South East Asia?”

46. The answer to this question is contained in some of the documents attached to the Defence submission. A series of Minutes – CA R1-4-B003, CMP/FB 107/01, CDF R1-5B-CDF, and in particular CDF 249/01 – led to the award, in 2001, of the ASM for non-warlike service to RCB. Those documents make it clear that the award of the ASM for RCB was due to the unique circumstances RCB faced, such as:

“...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.”³⁵

“...the role of the RCB was to provide a quick-reaction force to meet the communist terrorist threat...”³⁶

“RCB service was to protect the base against terrorist insurgency...”³⁷

³³ Feeney, D., Senator, Parliamentary Secretary for Defence, Letter to Mr Robert Cross, 19 May 2012.

³⁴ *Fulcher and the Department of Defence* [2020] DHAAT 08 (14 May 2020), para 51.

³⁵ Barrie, C.A., CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, CDF 249/01, Issues para 5.

³⁶ *Ibid.*

³⁷ Mueller, D., A/CDF, *Implementation of the Recommendations of the Review of Service Entitlements Anomalies in Respect of South East Asian Service 1955-1975*, CDF 440/2000, Issues para 5.

47. The mission of RCB was therefore distinct and the award of the ASM was for that distinct service and not as part of a wider catch-all as appears to be the case with the NZ decision.

The Defence “reasoning” for peacetime service

48. At para 3.7 of the Defence submission, it makes the claim that:

“Rifle Companies which rotated through Air Base Butterworth were never engaged in activities directly related to hostile or dissident elements.”

49. Given the abundance of evidence before the Tribunal of the role of RCB in defence of the air base and the identified threat from “hostile or dissident elements” this claim is untenable. Even the documents that Defence provided with its submission make it clear that the RCB was deployed specifically to counter the threat of “hostile or dissident elements” to the base, see para 46 above.

50. Para 3.7 becomes clearer when it is paired with para 3.29g, which states that Hansard [which one?] confirms that RCB “...were not to be used for any security operations outside of the Air Base...”. It then becomes apparent that Defence considers that only offensive operations are capable of being “directly related” to the identified threat.

51. This overlooks the concept of deterrence that underpins defence policy and tactical doctrine. The object of defence is to deter attack while retaining the capability to take offensive action if required. This was the case with the way in which RCB was employed as part of the measures to defend the airbase at Butterworth. The NZ review acknowledged that “Deterrent operations by their very nature anticipate threats, and if those threats do not eventuate, it may be because they are successful”.³⁸

52. The Defence position becomes even more untenable when legal precedent is considered. 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.”³⁹

53. Einfeld J went on to say:

³⁸ 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.

³⁹ *David Norman Ahrenfeld v Repatriation Commission* [1990] FCA 319, para 33.

“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'.”⁴⁰

54. 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”⁴¹
55. The RCB, through its QRF role in particular, was integrally involved in activity “directly intended for an encounter with the enemy”, even if that activity was wholly defensive in nature and even if no encounter actually happened due to the deterrence being successful.
56. Para 3.29a of the Defence submission says that the Malaysian Government did not request, and Australia did not offer, military assistance throughout 1970-1989. The RCBRG extensively covers the fact that no such request was necessary under the legislation and policy of the time for service to be *warlike*, only the presence of an enemy threat was necessary.
57. If the Defence position that a request from the host country was necessary for *warlike* service was correct it would bring into question the recognition of *warlike* service of those who served during the Vietnam war. A paper was tabled in Parliament in 1975 and is currently available on the Prime Minister & Cabinet website. The paper is entitled *Australia's Military Commitment to Vietnam* and makes it clear that South Vietnam did not request Australian military assistance:
- “Despite the fact that the Government of South Vietnam on 29 April 1965 announced that the Australian battalion was sent in response to a request from South Vietnam, this is not borne out by the evidence of the documents.”⁴²
58. The paper then goes on to discuss how none of the subsequent increases in Australian forces was at the request of the South Vietnamese government but merely accepted by it.
59. Defence also overlooks that an Exchange of Notes by the Malaysian and Australian Governments was in place from 1971 as part of the Five Power Defence Agreements (FPDA). That Exchange of Notes stated that:
- “The Government of Malaysia agrees that the Australian force stationed at Butterworth, composed of two squadrons of fighter aircraft and their supporting units and from time to time an infantry company may continue to be stationed here”.⁴³
60. Defence's response also overlooks that a resurgence of communist insurgency was underway at the time Australia became a signatory to the FPDA and to the Exchange

⁴⁰ Ibid., para 47.

⁴¹ Ibid., para 46.

⁴² *Australia's Military Commitment to Vietnam*, 1975, <https://pm.transcripts.pmc.au/sites/default/files/original/00003737.pdf>, page 1 para 4.

⁴³ *Five Power Defence Arrangements – Exchange of Notes constituting an Agreement Between the Government of Australia and the Government of Malaysia Regarding External Defence*, National Archives of Australia Barcode 30156205, 1 December 1971.

of Notes between Australia and Malaysia. The Malaysian Communist Insurgency 1968-1989 is well documented. Defence has previously acknowledged that during this period the 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 Dec 89."⁴⁴ The exchange of notes and FPDA were both signed in 1971.

61. Defence would also be aware of the message of thanks from the Malaysian CDF on the 50th anniversary of the deployment of RCB to Butterworth where he confirmed that a resurgence of the communist insurgency was ongoing for the whole period of RCB deployments 1970 to 1989.

62. Para 3.29b of the Defence submission claims that the "...activities of communist terrorists in Malaysia...have been found to be incidental to..." ADF personnel at Butterworth. There is considerable evidence in the RCBRG submission that demonstrates that the communist terrorist threat to the base was not an "incidental" matter. In the early 2000s the CDF even acknowledged that the very reason for the existence of RCB was "the activities of communist terrorists in Malaysia":

"...the role of the RCB was to provide a quick-reaction force to meet the communist terrorist threat..."⁴⁵

"RCB service was to protect the base against terrorist insurgency..."⁴⁶

63. The RCBRG submission provides evidence to show that, in fact, RCB service was integral and crucial to the defence of Butterworth from "the activities of communist terrorists in Malaysia".

64. In 1971 Defence were well aware of the inability of Malaysian forces to defend their own base against insurgents and identified that the essential element for doing so was the RCB. A secret FARLEY report from 1971 sets out the reason for the report:

"To combat the risk of an attack on Air Base Butterworth, Commander ANZUK Air Headquarters...directed the Officer Commanding Air Base Butterworth to set up a committee to assess what counter measures would be required to provide Air Base Butterworth with a capability to meet any threat to the Base."⁴⁷

65. The report advised that:

"...establishments do not provide for measures to fully counter the assessed threat to ANZUK installations and equipment arising from the resurgence of communist activity in West Malaysia."⁴⁸

66. It also advised that:

⁴⁴ Barrie, C.A., CDF, *Recommendations of the Review of Service Entitlement in Respect of the Royal Australian Air Force and Army Rifle Company Butterworth Service 1971-1989*, CDF 249/01, page 1 dot point 5.

⁴⁵ Ibid.

⁴⁶ Mueller, D., A/CDF, *Implementation of the Recommendations of the Review of Service Entitlements Anomalies in Respect of South East Asian Service 1955-1975*, CDF 440/2000, Issues para 5.

⁴⁷ Parker, I.S., *Counter Measures to Security Threat to Air Base Butterworth Until End 1972*, 24 December 1971, para 3.

⁴⁸ Ibid., para 22.

“...there is a significant deficiency in the capability at Air Base Butterworth to oppose or even contain, any attack or attempted sabotage.”⁴⁹

67. The Malaysians are commended for their co-operation in preparation of the Shared Defence Plan but:

“...their capability to implement the Plan is unproven. It is known that they are untrained in weapon handling and have only limited stocks of weapons and no ground radio communications. The effectiveness of the RMAF to assist in the shared defence of Air Base Butterworth is therefore suspect.”⁵⁰

and

“The Malaysian lack of capacity to effectively provide for their role in the security of Air Base Butterworth is a cause of serious concern...”⁵¹:

68. The report concluded that:

“Current security arrangements provide for a Shared Defence Plan...which is adequate to meet the threat, if the Base receives advance warning. On the other hand, arrangements are inadequate to meet a surprise attack...”⁵²

69. To guard against this surprise attack which, according to various intelligence assessments throughout the period, was the most likely form of attack, Butterworth required an:

“...essential permanent quick reaction force needed to meet a surprise attack, or the personnel to guard against sabotage.”⁵³

70. That quick reaction force (QRF) was provided by the RCB and the report warned that:

“...unless an Army presence can be guaranteed at all times, two flights of ADGs would be required to sustain a Quick Reaction Force.”⁵⁴

71. The 2020 DHAAT review correctly found that:

“... the deployed Army company was integrated into the arrangements to protect the Air Base.”⁵⁵

72. RCB was not only an integral part of the defence of Butterworth but was considered by Australian authorities to be *the most crucial*, and only reliable, aspect of Butterworth’s defence against communist insurgents.

73. At para 3.29c Defence assert that the Malaysian government “...never declared a ‘Second Emergency’ due to the communist terrorist threat. The Malayan Emergency of 1948-1960 was marked by a formal Government declared Emergency.”

⁴⁹ Ibid., para 26.

⁵⁰ Ibid., para 40.

⁵¹ Ibid., para 41.

⁵² Ibid., para 46.

⁵³ Ibid., para 23.

⁵⁴ Ibid., para 47c.

⁵⁵ *Fulcher and the Department of Defence* [2020] DHAAT 08 (14 May 2020), para 36.

74. The RCBRG submission discusses Defence's changing argument on this point from there being "no war or emergency" until veterans proved there was then shifting to the argument that there was an emergency but "There was no use of emergency powers...in relation to communist terrorists or insurgents".⁵⁶ On being provided with evidence to the contrary the VCDF simply refused to respond.

75. The Malaysian Prime Minister at the time was certainly under the impression that Malaysia was facing a second emergency:

"In September 1975 the Malaysian Prime Minister, Tun Razak, described the recent resurgence of communist guerrilla activity in Peninsular Malaysia as "The New Emergency"..."⁵⁷

76. In his message of greetings for the 50th anniversary of RCB deployments the Malaysian CDF considered the period 1970-1989 to part of "the resurgence of the communist insurgency".

77. Ultimately however it does not matter whether Malaysia declared an emergency or whether it was for Sino-Malay disturbances or used against communists. It is not relevant to the question of whether RCB service was *warlike* or whether Malaysia was, as they believed, in a state of war.

78. As the Federal Court of Australia has stated, a state of war is not determined by documents but by events on the ground:

"Nor is the ascertainment of the existence of a state of war under municipal law or international law the relevant criterion for our purposes... However, the rules of international law in this area throw some light on the intended operation of our statutory definition. As Lord McNair and A.D. Watts (The Legal Effects of War, at p.2) remind us, being "at war" is a technical concept referring to a state or condition of affairs, not mere acts of force."⁵⁸

"His Honour held, correctly, in our opinion, that the statutory definition of "theatre of war" is looking to practical, rather than juristic concepts. It clearly contemplates an actual, as distinct from a legal or theoretical, state of warfare."⁵⁹

Concluding remarks

79. The key deficiency in the Defence submission is its failure to support its myriad assertions with any discussion or, more importantly, evidence. By contrast, the RCBRG submission and this rejoinder is heavily reliant on primary and secondary evidence and discusses its significance.

80. It is an approach that RCB veterans are used to. It seems that Defence has the culture that what it says is gospel and therefore there is no need to prove itself. The Defence submission is an example of the approach taken by Defence towards RCB veterans over many years – a refusal to engage honestly with the evidence. It is the

⁵⁶ Ibid.

⁵⁷ Stubbs, R., *Peninsular Malaysia: The "New Emergency"*, Pacific Affairs, Vol 50, No 2 (Summer, 1977), p 249

⁵⁸ *Thomas Joseph Marsh v the Repatriation Commission* [1987] FCA 303, para 28.

⁵⁹ Ibid., para 31.

reason that many in the RCBRG have also engaged with the Royal Commission into Veteran Suicide.

81. The principles enunciated by MAJGEN Mohr in his report, which was adopted by Government, are fundamental to the process of reclassifying past service.
82. MAJGEN Mohr stated that 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.
83. The Defence submission confirms at 3.29 e. that JIO identified the communist insurgents were a threat to the Butterworth Airbase during the period 1970 to 1989. RCB was deployed to react to an attack on the airbase, including QRF reaction to vital points. Accordingly, it follows that RCB service should be reclassified as operational service and should be awarded the AASM.

“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.”

MAJGEN Mohr, *REVIEW OF SERVICE ENTITLEMENT ANOMALIES IN RESPECT OF SOUTH-EAST ASIAN SERVICE 1955-75*, February 2000, p. 10.

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