



## Rifle Company Butterworth Review Group

### Response to issues raised by the Tribunal

#### Warlike, expectation of casualties; “Rules” pertaining to the AASM and VEA

1. The Tribunal provided the parties with a Cabinet-In-Confidence document titled *ADF Personnel Deployed Overseas – Conditions of Service Framework* (Framework Document). The document is Cabinet Minute of 17 May 1993, No. 1691, Submission 1021.
2. This document laid the basis for determination of conditions of service and the warlike/non-warlike framework from that time on. It replaced Cabinet Directive 1048 of July 1965 on how determinations of allotment were to be made with determinations of how warlike/non-warlike service were to be made. After its adoption by the government, the new framework of warlike/non-warlike was incorporated into the VEA.
3. It is a useful document for considering some of the issues raised by the Tribunal Chair at the Zoom meeting of 11 October 2022. However, the first point to make is that the conditions of service framework, like Cabinet Directive 1048, was designed for prospective not retrospective determinations of service and so care must be taken in applying the criteria therein that differing, and evolving, terminology does not disadvantage those whose service was given at a time of earlier terminology. Technicalities and wordplay should not be used as an excuse to deny service loyally given.
4. The Framework Document itself sets out the problematic issue of differing terminology and advises that the new terms encompass all existing terms.<sup>1</sup> So a “risk of harm from hostile forces or dissident elements” that pertained to RCB service is encompassed by and not eliminated by the new terminology. The new terminology cannot be used to disallow service given under older terminology. What must be determined is where that older terminology sits within the current framework.
5. The prospective nature of the Framework is clear in that the Framework Document is explicit that it is to be applied to *future* deployments and not retrospectively. The Background to the Framework Document states that the purpose of the new framework was to:

<sup>1</sup> Cabinet-In-Confidence, *ADF Personnel Deployed Overseas – Conditions of Service Framework* (Framework Document). The document is Cabinet Minute of 17 May 1993, No. 1691, Submission 1021, Background para 4.

“...ensure that consistent and timely conditions of service could be established for ADF personnel deployed in the future.”<sup>2</sup>

6. Para 3 of the Framework Document also states that it is designed to “cater for possible future ADF involvement in overseas deployments...”.
7. Attachment A of the Framework Document articulates that previous conditions of service were reviewed and that they would “...form the basis of a specific package that will suit future ADF overseas deployments”.<sup>3</sup>
8. The Department of Prime Minister and Cabinet considered that the new framework would:

“...bring consistency to the determination of future benefits...”<sup>4</sup>

9. The definitions of warlike and non-warlike have been amended over time. The latest and current version was approved on 27 February 2018 by the Minister for Defence, Marise Payne. In approving the new definitions the Minister agreed that they “...should only be applied to all future new ADF operations”,<sup>5</sup> that is, not retrospectively.
10. Liz Cosson, Secretary DVA, in a 2019 letter to LTCOL Russell Linwood advised that “The classification of ‘warlike service’ generally only applies to service after 1997.”<sup>6</sup>
11. The general approach to retrospective legislation was summarised by Lord Kerr in the Supreme Court in the UK:

“The general rule, applicable in most modern legal systems, is that legislative changes apply prospectively. Under English law, for example, unless a contrary intention appears, an enactment is presumed not to be intended to have retrospective effect. The logic behind this principle is explained in Bennion on Statutory Interpretation, 6th ed (2013), Comment on Code section 97:

“If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow’s backward adjustment of it.”<sup>7</sup>

12. The High Court of Australia is in accord with this view:

“...the general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.”<sup>8</sup>

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<sup>2</sup> Ibid., Background para 1.

<sup>3</sup> Ibid., Attachment A, para 2.

<sup>4</sup> Ibid., Attachment E, Consultation Comments, Department of the Prime Minister and Cabinet, para 2.

<sup>5</sup> Binskin, M.D., Chief of the Defence Force, *Review of the Definitions of Nature of Service Classifications for Australian Defence Force Operations*, Ministerial Advice, CDF/OUT/2017/952, 23 November 2017, para 7.

<sup>6</sup> Cosson, L., *Letter to LTCOL Russell Linwood*, EC 19-00112, 30 September 2019.

<sup>7</sup> *Walker v Innospec Limited and others* [2017] UKSC 47, para 22.

<sup>8</sup> Dixon CJ, *Maxwell v Murphy* (1957) 96 CLR 261, 267.

13. The presumption against retrospective application can be refuted where there is the clear intent in the legislation to do so. In *Rodway v The Queen* (1990) the court held that:

“the rule at common law is that a statute ought not be given a retrospective operation where to do so would affect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction.”<sup>9</sup>

14. The RCBRG submits that the presumption against retrospective application of legislation is not overcome by the Framework Document or its later iterations. Rather, it is articulated within them that retrospectivity is *not* to apply.

15. The RCBRG further submits that, in line with Defence declarations, the SOPs for review of past service and the Defence Minister’s statements to Parliament, RCBs service should be “... considered in the context of the legislation and policies that applied at the time of the service”.<sup>10</sup> This appreciation is at the heart of the RCBRG’s main submission to the Tribunal (Submission 065).

16. Additionally, the Defence submission to this Tribunal states that:

“Reviews of previous Australian Defence Force service for nature of service purposes use the legislation and policies applicable at the time...”<sup>11</sup>

17. However, the RCBRG offers the following appraisal of the Framework Document and how RCB service falls within its warlike definition.

### **Warlike Classification**

18. The 1993 Framework Document defines warlike service as (option (c), Peace Enforcement, is omitted as not relevant):

“Warlike operations are those **military activities** where the **application of force** is authorised to pursue specific **military objectives** and there is an **expectation of casualties**.

These operations encompass but are not limited to:

- (a) a state of **declared war**;
- (b) conventional **combat operations** against an **armed adversary**;<sup>12</sup>

19. The key elements of the definition, underlined above, will now be examined in their applicability to RCB service.

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<sup>9</sup> Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ, *Rodway v The Queen* (1990) 169 CLR 515, 518.

<sup>10</sup> Cooper, J, Brief *PDR mb-18001788 dated 27 November 2018*, bullet point 4, page 2.

<sup>11</sup> Campbell, A.J., CDF, *Inquiry into medallic recognition for service with Rifle Company Butterworth Department of Defence submission*, EC22-001541, July 2022, Submission 096, para 3.18.

<sup>12</sup> Cabinet-In-Confidence, *ADF Personnel Deployed Overseas – Conditions of Service Framework* (Framework Document). The document is Cabinet Minute of 17 May 1993, No. 1691, Submission 1021, Attachment B, para 1.

## **Military activities**

20. Military activity, or military action, is a broad concept which “means military action generally, not a limited or specific military operation.”<sup>13</sup> By its very nature RCB service at Butterworth was military activity.

21. RCB’s involvement in ‘military activities’ is well documented in the evidence provided to the Tribunal. Those ‘military activities’ included such action as securing the air base to “protect against sabotage or to react quickly to any attempted incursions by CT groups”,<sup>14</sup> protection of Australian assets,<sup>15</sup> protection of vital points and shared facilities and supporting “the operational function of Air Base Butterworth”<sup>16</sup> (the base was operating against Communist Terrorists), and ‘meeting the communist terrorist threat’<sup>17</sup>.

## **Application of force**

22. Application of force was authorised at least by the Rules of Engagement (ROEs) and the Shared Defence Plan<sup>18</sup>. Defence asserts that the ROEs for RCB were “...defensive in nature and to be applied within the air base only.”<sup>19</sup> They also claim that the ROEs were “...defensive (peacetime) only...” and simply reflected ADF personnel’s “...inherent right to use force in self-defence including within bases in Australia...”<sup>20</sup> But that does not reflect the full extent of the force available to ADF personnel at Butterworth either in the ROEs themselves or through other authorisations to use force. Nor does it reflect the ‘inherent right to use force’ in Australia, for which no ROEs are necessary and the use of excessive force (such as shooting trespassers) is unlawful.

23. The DHAAT, in upgrading the service of RAN ships that served in Somalia, whose ROE were “restricted to self defence only”<sup>21</sup>, the Tribunal found that:

“the ROE is not, by itself, an appropriate measure to limit medallic recognition”<sup>22</sup>

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<sup>13</sup> Houston, A.G, CDF, *ADDP 0.64 – Law of Armed Conflict*, Defence Publishing Service, 11 May 2006, para 5.29.

<sup>14</sup> Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam*, addressed to ‘Minister’.

<sup>15</sup> Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 43.

<sup>16</sup> Joint Intelligence Organisation, *Malaysia: The Threat to Air Base Butterworth*, August 1975, para 7.

<sup>17</sup> 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.

<sup>18</sup> Parker, I.S., Air Cdre, *Shared Defence of Air Base Butterworth: Operation Order No. 1/71*, 8 September 1971.

<sup>19</sup> Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 54.

<sup>20</sup> 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.

<sup>21</sup> Pearce, D., Chair DHAAT, Report of the Defence Honours and Awards Tribunal on the Inquiry into recognition of ADF Service in Somalia between 1992 and 1995, 5 July 2010, para 57.

<sup>22</sup> *Ibid.*, para 62f.

This view is in accord with that provided by Professor Dale Stephens attached to RCBRG submission 065 at Appendix H. Professor Stephens considered that:

“...there can only ever be a general relationship between the issued ROE and the actual threat level faced by deployed ADF members.”<sup>23</sup>

Overstating the ROE as Defence has repeatedly done is therefore unhelpful in determining the nature of RCB service.

24. The Framework Document says only that “the application of force is authorised”. It does not delimit said application of force, only requiring that it is authorised.

25. Air Base Butterworth was a protected place under Malaysia’s *Protected Areas and Protected Places Act 1959*.<sup>24</sup> 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...”<sup>25</sup>

26. Sentries or patrols could fire on that person if they did not stop after three challenges.<sup>26</sup> Persons apprehended could also be shot if attempting to escape and after being challenged to stop twice.<sup>27</sup> 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 Defence asserts. It is standard procedure for conventional combat when in a defensive position to first challenge unknown persons approaching your position before shooting.

27. 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 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:

.... 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”.<sup>28</sup>

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<sup>23</sup> Stephens, D., *Rules of Engagement and Threat Levels re Butterworth Rifle Company Butterworth*, University of Adelaide, 14 June 2022, p 1

<sup>24</sup> Parker, I.S., Air Cdre, *Shared Defence of Air Base Butterworth: Operation Order No. 1/71*, 8 September 1971, para 5.

<sup>25</sup> Parker, I.S., Appendix 5 to Annex C to Air Base Butterworth Op Order No 1/71, 8 September 1971, para 14.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid., para 15.

<sup>28</sup> Department of Air, Brief for DCAS Concerning Security of Butterworth, undated, Ref 564/8/28, para 16.

28. This role to relieve an over-run position and counter attack enemy occupying positions on base clearly stems from an authorisation to use force for its accomplishment.

### **Military objectives**

29. The Law of Armed Conflict (LOAC) defines military objective thus:

“The term ‘military objective’ includes combatant members of the enemy armed forces and their military weapons, vehicles, equipment and installations. It may include other objects that have military value such as bridges, communications towers, electricity and refined oil production facilities. Objects are however, only military objectives if they come within the following definition:

‘those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage’. (Article 52 (2) GP I)”<sup>29</sup>

30. LOAC goes on to clarify what “location” means as it relates to being a military objective:

“**Location** includes areas which are militarily important because they must be captured or denied to the enemy or because the enemy must be made to retreat from them. An area of land can, thus, be a military objective.”<sup>30</sup>

31. The role of the RCB under the Shared Defence Plan<sup>31</sup> (which RAAF personnel also came under) was to deny Airbase Butterworth, in particular its Vital Points, to the CT. It was to engage any CT that attempted to seize or damage any part of the base or equipment and to destroy that CT force or make it retreat from the base. This was initially the role of the QRF, with the rest of the company and RAAF squadrons coming on line as required. The RCB therefore pursued at least two military objectives – denial of the militarily important area of Air Base Butterworth, and its infrastructure, to the enemy; and engaging combatant members of the enemy armed forces (CT) that penetrated onto the base to destroy them or force their withdrawal.

### **Expectation of casualties**

32. Given that determination of service, such as that under the Framework Document, is generally prospective it must be asked how an expectation of casualties as opposed to a possibility of casualties is determined.

33. The ADF Pay and Conditions Manual expands on what an ‘expectation of casualties’ looks like. It says:

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<sup>29</sup> Houston, A.G, CDF, *ADDP 0.64 – Law of Armed Conflict*, Defence Publishing Service, 11 May 2006, para 5.27.

<sup>30</sup> *Ibid.*, para 5.29.

<sup>31</sup> Parker, I.S., Air Cdre, *Shared Defence of Air Base Butterworth: Operation Order No. 1/71*, 8 September 1971.

“ADF personnel are authorised to use force to pursue specific military objectives and there is an expectation of ADF casualties as a result.”<sup>32</sup>

34. In Defence’s own words it is clear that where ADF personnel are authorised to use force to achieve military objectives “...there is an expectation of ADF casualties as a result” [author’s italics]. That is, when personnel are placed in harm’s way to pursue a military objective by force that situation itself *creates* the expectation of casualties. This is nothing new and has underpinned the incurred danger test that has been at the heart of the Australian classification systems since WWI and is discussed at length in Submission 065.

35. The mere fact that RCB were placed at Butterworth to defend it and “meet the communist terrorist threat” therefore *created* an expectation of casualties.

36. This is reinforced by MAJGEN Mohr’s findings in relation to Ubon. Mohr said:

“The decision for a No 79 Squadron aircraft to engage an intruder or not within Thai airspace now clearly rested with the OC of the Air Operations Centre at Don Muang (near Bangkok), and the final decision to engage had passed to the airborne pilot. Again the danger of casualties was clearly forecast.”<sup>33</sup>

“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”<sup>34</sup>

37. Mohr’s thrust was that where there is the possibility of contact with an armed enemy, even if that possibility is slight, those circumstances carried with them the expectation of casualties. As Mohr points out, the Defence Committee itself considered that:

“the probability of enemy air attacks [on Thailand] would be slight”.<sup>35</sup>

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<sup>32</sup> <http://www.defence.gov.au/payandconditions/adf/chapter-17/part-1/div-1.asp>

<sup>33</sup> 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, page 71.

<sup>34</sup> *Ibid.*, page 73.

<sup>35</sup> *Ibid.*, page 70.

38. Yet Defence has consistently claimed that there was “...definitely no expectation of any casualties”<sup>36</sup> during RCB’s deployment. Defence has asserted that:

**“Expectation of Casualties**

An attack on Air Base Butterworth was considered by the threat assessments to be unlikely. The overall level of threat was considered to be LOW. As such, there was no expectation of casualties.”<sup>37</sup>

and

“There was no expectation of an attack. Threat assessments concluded that, while an attack was possible it was unlikely.”<sup>38</sup>

39. This is an interesting turn of phrase by Defence – “while an attack was possible it was unlikely”. This very situation was considered by the Federal Court in *Repatriation Commission v Mitchell*. In a scenario not unlike that of RCB. Approving the decision and reasoning of the Administrative Appeals Tribunal (AAT) the court said that:

“It has found that Higgins Field was an operational airfield used for conducting aerial operations against the enemy in Papua New Guinea, and at that time against the enemy in Rabaul, and further that it provided refuelling facilities for allied bombing fleets operating north and north west of the Cape coming from or going to Townsville. The Ack Ack anti-aircraft unit was part of the defence system to defend the operations at Higgins Field from hostile aerial attack, as much as the use of sentries and roving piquets were part of the defence of the facility from hostile incursions by Japanese landing parties from the sea.”<sup>39</sup>

40. The court further approved the AAT determination that “possible but unlikely” attack satisfied the requirements for qualifying service:

“The actions of Command at Higgins Field in dispersing aircraft, maintaining anti-aircraft guns in position, and protecting the installations and equipment with armed sentries and roving picquets are I believe consonant not only with sensible precautions, but with the understanding of perhaps unlikely, but always possible, raids launched from aircraft or from submarine landings, or surface carriage of small parties.”<sup>40</sup>

41. MAJGEN Mohr, in finding service at Ubon 1965-68, pointed to four matters that led him to that conclusion:

- “Operational control passed from Canberra to the AOC at Don Muang and the airborne pilot became the final arbiter of when to ‘open fire’.

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<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> *Ibid.*

<sup>39</sup> Cooper J, *Repatriation Commission v Mitchell* [2002] FCA 1177, para 25.

<sup>40</sup> *Ibid.*, para 15.

- Deletion of the words ‘attacking with weapons’ meant that the pilot could shoot first and not have to wait till the enemy aircraft had first attacked Thailand or friendly forces.
- All friendly forces were at last integrated into one cohesive system for the air defence of Thailand and Ubon.
- Maintenance of ‘Alert State Five’ operational readiness was the highest feasible operational status.<sup>41</sup>

He further said that:

‘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.”<sup>42</sup>

42. MAJGEN Mohr considered that the circumstances of being armed and ready at five minutes notice to engage an enemy was sufficient to create an expectation of casualties even though the possibility of an air attack on Ubon was slight.

43. Comparing MAJGEN Mohr’s four dotpoints to RCB service it can be said that:

- RCB infantrymen were the **only** arbiters of when to ‘open fire’
- RCB personnel did not have to wait for the enemy to attack to open fire but could do so after a challenge was ignored. For its counter penetration/counter attack role no such challenge was necessary
- All friendly forces were integrated into one cohesive system for the defence of Air Base Butterworth through the Shared Defence Plan
- RCB was in a constant state of operational readiness, ready to meet the communist terrorist threat to Butterworth

44. Five examples below taken from the material in Russell Linwood’s Submission 066, Annex L, demonstrate an expectation of casualties as the scenarios described necessitate factoring in casualties.

“...there could arise a threat of a force of 20 plus attempting to breach the outer perimeter of the Air Base. As there are no places of cover near the outer perimeter wire from which to repel such an attack, bunkers placed at strategic points inside the wire and manned with machine guns could overcome this problem.”<sup>43</sup>

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<sup>41</sup> 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 72.

<sup>42</sup> *Ibid.*, p 73.

<sup>43</sup> Parker, I.S., AIRCDRE, *Counter Measures to Security Threat to Air Base Butterworth Until End 1972*, RAAF BUT 07/3001/1/OPS, 24 December 1971, para 38.

“...if any new mine indicators or mine markers are found they should be reported, as knowledge of these markers by friendly forces will aid in the reduction of mine and booby trap casualties.”<sup>44</sup>

“It is the proximity of Butterworth to the CTO base areas on the Thai-Malaysian border that could render it an attractive target to the CTO.”<sup>45</sup>

“An attack by fire using mortars or other indirect fire weapons...is quite likely.”<sup>46</sup>

“... the use of booby-traps and minor acts of sabotage by subversive groups are relatively common throughout Peninsular Malaysia and pose a distinct threat, both to the Base and to Australian personnel and their dependents.”<sup>47</sup>

### **Declared War**

45. The RCBRG has not located a formal declaration of war for the relevant period.

### **Combat Operations**

46. Defence’s claim that RCB could only operate within the confines of the base is not only wrong – RCB could operate off base as well, as part of the Family Protection Plan, or at the direction of the OC RAAF Butterworth<sup>48</sup> – it also implies that only ‘offensive’ action off the base, as opposed to defending the base in situ, can constitute combat operations. This is reinforced by Defence’s assertion that RCB could not “...be employed in operations outside the gazetted area of the air base.”<sup>49</sup> This dichotomy between offensive action and defensive action, with only the former being considered combat operations is at odds with the view of the Federal Court.

47. The Federal Court in *David Norman Ahrenfeld v Repatriation Commission* [1990] FCA 319 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.”<sup>50</sup>

48. Einfeld J went on to say:

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<sup>44</sup> CO 6 RAR, *CT Mine and Booby Trap Markings and Indicators*, Annex N to 6 RAR R841/1/61, October 1972, Conclusion para 8.

<sup>45</sup> JIO, *Malaysia – The Threat to Air Base Butterworth*, RAAF 564/8/28, August 1975, page 7.

<sup>46</sup> *Ibid.*, page 25.

<sup>47</sup> Joint Intelligence Organisation, *The Security of Air Base Butterworth*, October 1975, para 48(d).

<sup>48</sup> Rowland, J.A., CAS, *Directive by the Chief of the Air Staff to the Officer Commanding RAAF Butterworth*, 1974, para 12b.

<sup>49</sup> Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 54.

<sup>50</sup> *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'.”<sup>51</sup>

49. Einfeld J further said that relying on a distinction “...between 'offensive action' and 'passive defence' seems to me clearly to involve an error of law”<sup>52</sup>

50. RCB had the role of counter-penetration and counter-attack throughout the period of service. These were offensive tasks designed to first contain and then destroy any communist terrorist forces that penetrated the base. They were an authorised use of force that cannot be described as “defensive only”. A secret Department of Air briefing in 1975 described the role 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”.<sup>53</sup>

51. The tasks of RCB, particularly in its QRF and counter penetration/counter attack roles to, for instance, “protect against sabotage or to react quickly to any attempted incursions by CT groups”,<sup>54</sup> or to “...meet the communist terrorist threat”<sup>55</sup> are clearly activities “...directly intended for an encounter with the enemy” and as such RCB was engaged in combat operations.

### **Armed adversary**

52. It is uncontested that the Communist Terrorist Organisation (CTO) constituted an armed adversary and a threat to Air Base Butterworth and its personnel. Defence has, on this point, previously pointed out that:

“...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.”<sup>56</sup>

“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.”<sup>57</sup>

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<sup>51</sup> Ibid., para 47.

<sup>52</sup> Ibid., para 46.

<sup>53</sup> Department of Air, Brief for DCAS Concerning Security of Butterworth, undated, Ref 564/8/28, para 16.

<sup>54</sup> Rowland, 7 October 1975, *Butterworth Base Security and Security of C130 Aircraft in South Vietnam*, addressed to 'Minister'.

<sup>55</sup> 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.

<sup>56</sup> Department of Defence, *Background Information Paper, Nature of Service Classification – ADF Service at RAAF Butterworth*, Nature of Service Branch, 14 October 2011, para 28.

<sup>57</sup> Ibid.

“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.”<sup>58</sup>

“The Joint Intelligence Organisation (now known as the Defence Intelligence Organisation) continually assessed the threat as LOW for Butterworth over the period in question.”<sup>59</sup>

53. Additionally, the evidence provided to the Tribunal by the RCBRG includes copious accounts of the armed threat posed by the CTO. The RCBRG’s main submission (Submission 065) includes at para 55 extracts of intelligence assessments of the arms available to the CTO.

### **Eligibility Criteria for the Australian Active Service Medal**

54. The eligibility criteria for the AASM after 14 February 1975 are contained in *Commonwealth of Australia Gazette No. S 335, Schedule, Australian Active Service Medal Regulations* – dated 2 November 1988. Regulation 3 (Declaration of prescribed operations) provides that:

“The Governor-General, on the recommendation of the Minister, may declare a warlike operation in which members of the Defence Force are, or have been on or after 14 February 1975, engaged, to be a prescribed operation for the purpose of these Regulations.”

55. Regulation 4(1) (Conditions for award of the Medal) provides that:

“The Medal may be awarded for service in or in connection with a prescribed operation.”

56. The eligibility criteria for the AASM prior to 14 February 1975 are contained in *Commonwealth of Australia Gazette No. S 18, Schedule, Regulations Governing the Award of the Australian Active Service Medal 1945-1975* – dated 19 January 1998. Regulation 3 (Prescribed operations) provides that:

“The Governor-General, on the recommendation of a Minister, may declare a warlike operation in which members of the Defence Force were engaged at any time during the period that commenced on 3 September 1945 and ended on 13 February 1975, to be a prescribed operation for these Regulations.”

57. Regulation 4(1) (Conditions for award of the Medal) provides that:

“The Medal may be awarded to the following persons who served in connection with a prescribed operation:

(a) a member, or a former member, of the Defence Force;

### **Eligibility under the VEA**

58. There are three key threshold tests for eligibility for veterans’ entitlements under the VEA that are pertinent to RCB:

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<sup>58</sup> 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.

<sup>59</sup> Campbell, A.J., CDF, *Inquiry into medallic recognition for service with Rifle Company Butterworth Department of Defence submission*, EC22-001541, July 2022, Submission 096, para 3.29e.

1. Qualifying Service
2. Operational Service
3. Eligible war service

### **Qualifying Service**

59. Section 7A of the VEA provides that:

(1) For the purposes of Parts III and VA and sections 85 and 118V, a person has rendered qualifying service:

(a) if the person has, as a member of the Defence Force:

(iii) rendered service outside Australia in an area described in column 1 of Schedule 2 during the period specified in column 2 of that Schedule opposite to that description, as a member of a unit of the Defence Force that was allotted for duty, or as a person who was allotted for duty, in that area; or

(iv) rendered warlike service;

60. In reference to 1(a)(iii) above, Section 5B(2) clarifies that a reference in the Act to a person, or a unit of the Defence Force, that was allotted for duty in an operational area (whether retrospectively or otherwise) is a reference to the operational areas listed in Schedule 2. [As the RCBRG has maintained that RCB service met the criteria for allotment, that service would need to be added to Schedule 2 and the Act amended accordingly to fit under this section.]

61. Warlike service is defined in Section 5C as “service in the Defence Force of a kind determined in writing by the Defence Minister to be warlike service”.

62. Liz Cosson, Secretary DVA, in a 2019 letter to LTCOL Russell Linwood advised that, in relation to RCB service 1970-1989:

“The relevant legislative test under the *Veterans’ Entitlements Act 1986* (VEA) for qualifying service ... is different during the period you have identified. Rather, during this timeframe the VEA sets out that a person must have been allotted for duty in an operational area and served in that area for a defined period of time...The establishment of operational areas and the allotment process is a matter for Defence.”<sup>60</sup>

### **Operational Service**

63. Section 6C – Operational service--post World War 2 service in operational areas. Service in the operational areas listed in Schedule 2 are operational service by virtue of this section.

64. Section 6D – Operational service--other post World War 2 service. This section contains a list of further areas not necessarily included in Schedule 2 that are deemed to be operational service. RCB could be added under this section also.

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<sup>60</sup> Cosson, L., *Letter to LTCOL Russell Linwood*, EC 19-00112, 30 September 2019.

65. Section 6F – Operational service--warlike and non-warlike service. This section provides that:

“A member of the Defence Force is taken to have been rendering operational service during any period of warlike service or non-warlike service of the member.”

***Eligible war service***

66. Section 7 provides that:

“(1) Subject to subsection (2), for the purposes of this Act:

- (a) a person who has rendered operational service shall be taken to have been rendering eligible war service while the person was rendering operational service;

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