



ABN 85 120 213 381  
Level 4, 190 Queen Street, Melbourne 3000 Telephone: 03 8628.5561 Fax: 03 9642.5185  
Offices in: Melbourne, Brisbane, Darwin, Canberra, Perth, Sydney, Adelaide

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**TRANSCRIPT OF PROCEEDINGS  
TRANSCRIPT-IN-CONFIDENCE**

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**DEFENCE HONOURS AND AWARDS APPEALS  
TRIBUNAL**

**PANEL:**

**MR STEPHEN SKEHILL, Chair**

**AIR COMMODORE TONY GRADY (Ret'd), Member**

**REAR ADMIRAL ALLAN DU TOIT (Ret'd), Member**

**INQUIRY INTO MEDALLIC RECOGNITION FOR SERVICE  
WITH RIFLE COMPANY BUTTERWORTH**

**TUESDAY 04 APRIL 2023**

**ROYAL ON THE PARK HOTEL, BRISBANE**

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DHAAT RCB 04/04/2023

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Transcript-in-Confidence

5 THE CHAIR: Let's start. I want to repeat again yesterday—what I said yesterday about thanks to everybody for their contribution yesterday. I also want to make particular thanks to those who tendered additional documents yesterday and particularly the department. I've had an opportunity to look at that material overnight. I'm sure others may not yet.

10 I don't think that's going to impede our discussions today, but I do want to acknowledge that this inquiry has been demanding for everybody, but particularly for the department, and I think within the department it's probably fallen primarily to Mr Hill and his team, and I understand that, rightly or wrongly, they have not been provided with additional resources for that purpose. So we are appreciative of it and do understand the pressure that that has brought, and we thank you for your efforts.

15 Before we go to the agenda proper, I think there is one issue that I am told will take two minutes to resolve the factual matter coming out of yesterday. So the clock has now started.

20 LIEUTENANT COLONEL MICKELBERG: Thanks, Mr Chair. So yesterday there was some discussion about security of weapons and Wing Commander Penney gave some evidence about the security of weapons from the RAAF perspective. The point has been made that the weapons that were stored in the RCB Armoury had their bolts in the weapons, which is unusual, because normally in Australia the bolts are kept separate from the weapons, for obviously security reasons.

30 Having said that, there was a sentry who slept in the armoury seven days a week, 24 hours a day in the RCB Armoury, the idea being that the weapons were then available to be able to be grabbed quickly in the event of a response. I'd like to know quickly ask Wing Commander Penney to explain the RAAF perspective in relation to the same matter.

35 WING COMMANDER PENNEY: Thanks Graeme. From our perspective, the same occurred in our armoury, which was totally at odds to what you would have found in Australia at any time and including today. The bolts were in the weapons. The armoury was alarmed, and it was subject to constant patrol by the RAAF police and SSB.

40 THE CHAIR: Okay, thank you. And - - -

LIEUTENANT COLONEL MICKELBERG: We were done within two minutes, so we appreciate that.

THE CHAIR: Okay. Now, we want to start talking about the definition of “non-warlike”, the 1993 definition. The Defence submission in January says that RCB Service was not non-warlike. Before we talk about what Defence says about that in their submission, I just want to put it in  
5 context, because that submission is turning a lot of history on its head.

The history is in 1993 the CEDA Inquiry, which recommended the creation of the ASM-4575, said that RCB Service was not clearly or markedly more demanding than peacetime service. Didn't give any  
10 reasons for that. There was no detailed analysis in its report, and we don't know what submissions it had before it, because it well predated the creation of the RCB Review Group.

In 1997, the cabinet, first at the Expenditure Review Committee and then at full cabinet, said that the 1993 definitions were appropriate to use in reviewing prior service and said that modern criteria, as it called it, were the way to go. Then we had the Moore review. Now, Moore said that RCB Service in FESR, up to 30 October '71, should be recognised by the ASM-4575, so it was therefore, in Moore's view, non-warlike.  
20

Minister Scott, in response to that, went to cabinet and he noted that Moore had reached that conclusion by applying an incurred danger test that he said, on legal advice, was not a correct interpretation of incurred danger. He said that Defence had retested all of the Moore  
25 recommendations against the '93 definitions and had come to essentially the same conclusions as Moore, and so applying the '93 test, Minister Scott's on Defence advice said that RCB Service was non-warlike.

The minister also advised cabinet that that approach would be used for any further historic claims for recognition of service. So following that cabinet decision, FESR service, on RCB - a lot of alphabet soup - was declared by the Governor General to be non-warlike. So that was service up to October '71.  
30

The minister announced that there would be a follow-on review to be conducted by Defence, and that review covered RCB Service beyond '71 up to '75 and beyond '75 up to '89. And Defence came to the conclusion and recommended to the minister that RCB Service be recognised as non-warlike, and the minister accordingly recommended to the Governor General and the Governor General declared RCB Service, from essentially '70 to '89, to be non-warlike.  
40

Around the same time, there were a number of letters that issued from the minister's office rejecting the proposition that RCB Service was warlike,

but confirming the proposition that it could be and was non-warlike. Then along came the Clarke review.

5 Now, the Clarke review said that RCB—and it was a review of BEA and (indistinct). The Clarke review said that RCB Service was neither non-warlike nor warlike. But in my view, and I think our view, the Clarke review doesn't hold water in this regard. It miscategorises the nature of that service. It says it was infantry training and after hours patrolling of the perimeter. I think that's contrary to the evidence.

10 It also said—and even if it was consistent with the evidence, it also said as a reason for rejecting it as non-warlike or warlike that it could equally well have been performed as part of peacetime activities in Australia.

15 Now that suggests that if you move from peacetime to warlike or non-warlike, you stop training and you stop garrison duties and I think that's just self-evidently silly. If you are in a more dangerous situation, the need for training, the need for garrison protection is ever greater than it is in peacetime. So while Clark said it was not warlike or non-warlike, we  
20 don't think that that counts for much.

And then consistent with the previous Defence treatment, 2007, the Vice  
25 Chief of the Defence Force recommended that RCB Service was not warlike, but that it should be for VA purposes treated as and declared to be non-warlike, either as non-warlike per se or hazardous and Minister Billson on Defence advice signed instruments to that effect, and those instruments, while not registered, were in my view legally made and remain on foot.

30 So that's a bit of a potted history, but we have now got the situation where Defence comes along and says, "Despite all that history, today RCB Service is not non-warlike". So a complete about-turn, it seems to me.

35 MR ARTHUR: I disagree, chair, but I am sure I will have an opportunity to speak about that. You're missing the next—the last term. So you're going to talk about the next ten years, of course.

40 THE CHAIR: The subsequent consideration—reconsideration of the Billson instruments, you know.

MR ARTHUR: So you're up to 2007?

THE CHAIR: Yes.

45 MR ARTHUR: You're going to talk through to today?

THE CHAIR: Yes, and I'm happy to do that - - -

MR ARTHUR: The next 16 years?

5

THE CHAIR: - - - because there's all that history that says non-warlike. Then when Defence realises that the Billson instruments haven't been registered, its initial approach is to fix them up and get them registered. It goes to DVA, who says, "Well, you did not consult us about that. It's going to cost a lot of money". And look at Clarke. And you've heard what I think about Clarke on this regard.

10

So then there is a review, 2010/2011, which says, essentially, the recommendation to Minister Billson was wrong. It was—there wasn't enough research. It was based on the RCB Review Group submission, which was selective, and I think it's subjective. It's the views of—and it's subsequent reports of the same nature.

15

It says, well, it was written by junior officers who weren't fully informed. And so it recommended that RCB Service remain classified as peacetime, notwithstanding that it had been classified as non-warlike; that is, not peacetime, and notwithstanding that the Billson instruments remained on foot. If that assessment was - - -

20

MR ARTHUR: So you're not going to talk to what the then minister after Minister Billson did, Chair? Are you going to disregard Minister Feeney's - - -

25

THE CHAIR: No, no, no. He accepted Defence advice and he said - - -

30

MR ARTHUR: So Minister Feeney told us to redo our homework - - -

THE CHAIR: Yes.

MR ARTHUR: - - - and include the air force and the other members of Defence who were employed at Butterworth at the time.

35

THE CHAIR: Yes.

MR ARTHUR: Not just the 132 members of Rifle Company Butterworth.

40

THE CHAIR: Yes.

MR ARTHUR: So to do a more thorough assessment.

45

5 THE CHAIR: Yes, and when you look at that assessment, it still comes back to saying—and the—well, the wording is slightly different, but it basically says there, the advice was put to Minister Billson without adequate research. It was based on selective facts put forward by junior officers from the RCB.

10 Never once does it say, “Here are some other facts, which if they had been considered, would lead to a different conclusion”. Never once does it say where those junior officers got it wrong. Never once does it say why their views were subjective, and when you go and look at the RCB Review Group’s submission, it’s not a series of anecdotes about individual service.

15 It’s essentially quoting Defence documents and making an argument based on them. Now, I’m not saying the argument was necessarily right, but it doesn't warrant the criticism that was made of it, in my view.

20 MR ARTHUR: Well, I disagree that that is a description that Defence didn't put those pieces into those submissions.

THE CHAIR: Well, if you can point them out to me, I’d be really grateful, because I can’t find them.

25 MR ARTHUR: Chair, it is your interpretation of those Defence documents. We have a different view on that interpretation. Mr Cross brought the—from the Rifle Company—RCB Review Group, brought forward the error to our attention in the first place, highlighting those weaknesses, which we then reviewed, so - - -

30 THE CHAIR: No, he brought forward a weakness that the determinations, the VEA determinations - - -

MR ARTHUR: Correct.

35 THE CHAIR: - - - hadn't been registered.

MR ARTHUR: Right.

40 THE CHAIR: He didn't bring forward and suggest that their submission was subjective, selective, lacking in any way.

MR ARTHUR: No, he quite correctly addressed the issue of not including the air force members at Butterworth and other members of the ADF.

45 THE CHAIR: Yes. Exactly.

MR ARTHUR: That's the point that I am making, nothing more. So nothing more.

5 THE CHAIR: No, and bear in mind - - -

MR ARTHUR: So now we are - - -

10 THE CHAIR: - - - I am not focusing on the other RAAF members at this point, because our terms of reference are RCB. As I said yesterday, we can make other recommendations and we may well make a recommendation that having regard to what Defence wrote at the time, considerations should now be given to including other personnel within the instruments under the DEA.

15 MR ARTHUR: I am sorry, Chair. We just heard from our witnesses from the air force yesterday at some length. We've had many discussions about our air force participation, their shared defence plan and so on and so on.

20 THE CHAIR: Yes.

MR ARTHUR: So we're not talking about the air force involvement at all, or we are?

25 THE CHAIR: Well, we're talking about - - -

MR ARTHUR: It seems pretty clear, yes?

30 THE CHAIR: We're talking about the history, but what I'm saying to you is read our terms of reference. They require us to consider recognition of RCB Service.

MR ARTHUR: For medals.

35 THE CHAIR: For medals and related to that. Now, you can argue, if you want, that RAAF service for like purposes is related to RCB Service. If you want to run that argument, I'm happy to hear it. But our primary focus is on RCB, not RAAF. The gentlemen who gave evidence yesterday, their evidence was primarily, I think, about their interactions with RCB, because RCB obviously worked with and to the RAAF base commander.

40 MR ARTHUR: Who were under his command.

45 THE CHAIR: Yes. Well, control.

DR ROBARDS: And Chair, can I confirm that our focus is on medals?  
Well, RCB.

5 THE CHAIR: Our focus is on recognition for RCB. Now, the fact is that  
in the history of it all, conditions of service, VEA recognition and  
medallic recognition all get brought into the mix. And we can't look at  
things in isolation. We've got to look at things in the big picture and  
that's what's happened all along. And if we're only looking at medals,  
10 why are we talking about nature of service?

MR ARTHUR: Because you brought it up, Chair.

15 THE CHAIR: No, no, no.

MR ARTHUR: The reference was very clearly the development of - - -

THE CHAIR: No, no, no.

20 MR ARTHUR: You brought it up.

THE CHAIR: The CDF brought it up in his submission to us. It's the  
whole - everything is interrelated.

25 MR ARTHUR: I don't see any other things on your terms of reference,  
but I understand - - -

THE CHAIR: Yes. No, I'm - - -

30 MR ARTHUR: Well, the terms of reference are very clear.

THE CHAIR: Yes, and - - -

MR ARTHUR: It doesn't say "and other things".

35 THE CHAIR: Matters related to, and if you read the Act, you'll see the  
capacity for the tribunal to look at the other things. So - - -

MR ARTHUR: No doubt that's the case. So we're at 2009.

40 THE CHAIR: Yes, so we - and then we get into 2010 and '11 and 2014  
and that says - all of that says it should be - remain classified as  
peacetime, notwithstanding that it had been classified as non-warlike for  
medals and non-warlike for VEA, but the significant point, I think, is that



the basis on which Defence criticised - it's never criticised it as far as I know, the grant of the ASM.

5 The basis on which it criticised the Billson instruments was that the RCB submission was not subjected to sufficient research by Defence, was selective and came from junior officers, who happened to be on the ground, unlike those in the department that wrote reviews in '10, '11 and '14, who, as far as I know, had no RCB service and who focused predominantly on what was the purpose of RCB deployment and that  
10 focus on the purpose always recognised the security role that the RCB was to play; sometimes listed in a different order of the three purposes that were identified, but it was always a recognised purpose.

15 When you go to definitions, the order of purpose is not there. There's nothing in the definitions that says "service, the primary purpose of which is" or anything like that. So it's when we come to look at the contention that you're now putting to us, it stands in stark contrast to what happened up to 2007. It is consistent with what was done in '10, '11 and '14 and subsequently in - well, I don't think there's any more reviews, but there's a  
20 lot of letters written by ministers on Defence advice that says it's peacetime.

25 But I can't see - and I've lost a lot of sleep over this - any analysis in there about why it's peacetime, why it was not non-warlike as previously declared. I've heard you say, "We did all that", but I really ask you to point the documents to me that show it, because I can't find it.

30 MR ARTHUR: So you are disregarding your own tribunal's review of 2010-2011 and all of the - - -

THE CHAIR: No, the tribunal review in - - -

MR ARTHUR: - - - assessment that was done there?

35 THE CHAIR: No, I'm not disregarding it. What I'm saying to you - - -

MR ARTHUR: You're disregarding Clarke.

40 THE CHAIR: I disregard Clarke, because I don't think the reasons hold.

MR ARTHUR: Well - - -

45 THE CHAIR: I note Clarke. I don't disregard it. I don't ignore it. But I don't think it carries substantive weight.

MR ARTHUR: So you're deciding that that's no good, so you're just ignoring that particular view?

5 THE CHAIR: No, no, no. I'm not deciding it's no good. I recognise what he says, but I also look at the reasons he gave. A conclusion without decent reasoning doesn't carry much weight. And if you look at his reasoning, a) I think it misconstrues the nature of RCB Service; and b) it says, well, you could have done this in peacetime in Australia.

10 MR ARTHUR: Right.

THE CHAIR: That doesn't mean that it's not non-warlike or not warlike. You don't stop training and garrison duty when you move into a non-warlike state, do you?

15 MR ARTHUR: I'm not sure I understand the framing of the question, Chair.

THE CHAIR: Well, what don't you understand?

20 MR ARTHUR: Well, ask the question around medallic recognition or against nature of service, but putting them together and asking that question is incongruous.

25 THE CHAIR: Can you explain why?

MR ARTHUR: Well, because they're different things.

THE CHAIR: Well, cabinet said the same definitions apply to them.

30 MR ARTHUR: In 1993?

35 THE CHAIR: Indeed. And in 2018, the minister, on your advice - I don't mean yours personally - Defence's advice, approved new definitions, which were to apply only for nature of service or future deployments and implicit in that is that previous definitions remain on foot for the consideration of prior service. So where do these things differ if they've got the same definitions?

40 MR ARTHUR: Are we talking about medallic recognition or are we talking about nature of service?

THE CHAIR: I'm talking about - - -

MR ARTHUR: Are you talking about before an operation deployment - - -

THE CHAIR: I'm not drawing a distinction - - -

5

MR ARTHUR: - - - or are we talking about recognition of service after the deployment? Medals?

THE CHAIR: Okay. If you try to draw that distinction - and I don't believe it's necessarily correct - I certainly accept that in the ordinary course, prior to deployment, the minister should make or not make a declaration of warlike or non-warlike in order to trigger conditions of service - - -

15 MR ARTHUR: I think so.

THE CHAIR: - - - and at some stage - and you wouldn't expect it to be prior to service - the minister can make a determination under the VEA that service is warlike or non-warlike or he can leave it as peacetime. At some stage - and you certainly wouldn't expect it prior to service - there can be a recommendation to the Governor-General and a declaration by the Governor-General that service is warlike or non-warlike.

25 But if the same definitions apply in all those circumstances, what difference does it make whether the consideration is given prior to or post deployment? I don't see how there's any difference if the definitions are the same.

30 MR ARTHUR: So the circumstances on a deployment and what happens on the deployment, operationally what happens once those conditions occur, support medallic recognition.

THE CHAIR: No.

35 MR ARTHUR: Yes, they do. So they are - - -

THE CHAIR: The definition supports medallic recognition according to the cabinet. If it meets the definition, cabinet said that's the test for the declaration under the ASM reqs in this case, the ASM007 reqs, and the 74-75.

40

The definitions don't talk about declaring an operation to be warlike or non-warlike, in which certain things have happened. They talk about declaring an operation to be warlike or non-warlike depending upon the

risk and the likelihood or expectation of casualties, prospective things. That's what the declaration, the definitions talk about.

5 They don't talk about past events; they talk about prospectively, in the same way as you are saying - and correctly, I believe - that you determine the conditions of service prospectively. We've got three separate things: conditions of service, veterans entitlements, medallic recognition. But in 1993, cabinet said same definitions.

10 DR ROBARDS: But Chair, there's not a requirement under the medallic recognitions to hold to that particular point and in fact, there's subsequent elements that remove that nexus there.

15 THE CHAIR: Well, let's talk about those. Tell me what they are. Where does - do you mean that the definitions are no longer applicable, the medallic?

20 DR ROBARDS: Well, the 1993 definitions have certainly been replaced subsequently. There's the 2018 definitions - - -

THE CHAIR: No, no, the 2018 definitions specifically say they are nature of service for future operations.

25 DR ROBARDS: Yes.

THE CHAIR: They haven't replaced the 1993 definitions.

MR ARTHUR: That's not what the government thinks.

30 THE CHAIR: Well, that's what the Chief of the Defence Force said to the minister and what the minister approved.

DR ROBARDS: When? Do you mean - - -

35 THE CHAIR: In 2018. Read the minute. It's there in black and white.

DR ROBARDS: I'm not sure what minute you're referring to there, Chair.

40 THE CHAIR: Well, it's the minute you gave us. It's the minute from the Chief of the Defence Force to Minister McLean recommending the adoption of the 2018 definitions and it says, "These are to apply for nature of services purposes to future deployments".

45 DR ROBARDS: For nature of service.

THE CHAIR: For nature of service.

MR ARTHUR: Right.

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THE CHAIR: So it doesn't talk about medallic. It's maybe ambiguous about whether it talks about veterans. But it doesn't talk about medals.

DR ROBARDS: But we haven't been holding to the 1993 definitions for medallic purposes.

THE CHAIR: Well, you say that, and I don't quite know on what authority you say that. I know you say a number of times that for medals non-warlike means other than warlike. I can't find any authority or source for that proposition.

15

DR ROBARDS: The 2000 cabinet decision, Chair.

THE CHAIR: 2000 cabinet decision?

20

DR ROBARDS: To remove the nexus.

THE CHAIR: Well, that says, "Let's amend the VEA to take out medals as a qualifying factor for veterans' entitlements". It doesn't say anything about medals and if you look at the VEA today, there is still a number of VEA entitlements that hinge on having a medal. So that cabinet decision appears not to have been implemented, but it didn't talk about medals.

25

DR ROBARDS: It referred to removing the nexus.

30

THE CHAIR: Yes, and look, there is no nexus, necessary nexus, between nature of service, VEA and medals. They are three separate legal things. Getting one doesn't automatically entitle you to the other. The others. You have got to get three actions by the minister for the Governor-General to get - and they're quite separate in that sense.

35

But nowhere can I find anything that says the '93 definitions do not apply to the issuance of medals. If you've got something, please produce it, but you haven't done it yet. I've gone through everything you've given us in great detail, as have my colleagues, and we can't find it.

40

MR ARTHUR: So I don't believe that's true.

DR ROBARDS: No.

45

DR ROBARDS: So the 2001 briefing that was provided to, I think, the assistant minister. I'm trying to recall. The minister assisting the Minister of Defence, ADF medals policy.

5 THE CHAIR: Yes. Look, happy to talk about that. Interesting paper. It doesn't - nowhere in that paper does it say we recommend a different definition to the award of the ASM. It refers to and attaches the '93 definitions.

10 It says - it says a lot of things, some of which are just plain wrong. It says the '93 definitions came about after a negotiation between Defence and cabinet. That can't be right. They came about after a consideration by cabinet of a submission put forward by the minister, not Defence. Might have been written by Defence.

15 It has a number of factual errors in it. It says - it complains about anomalies from the awards of various medals. It makes a reference to Butterworth, which appears not to be a reference to RCB Service, because at the time the paper was written, RCB Service hadn't been awarded the  
20 ASM. I think it had been agreed to be awarded, but not awarded.

It talks about service at Butterworth as having various luxuries such as servants, which I think might have come as news to the gentlemen at the table here. It says - it complains that what should be an ADF matter has  
25 become a political matter, but that seems to have a major misconception of the nature of medallic recognition.

Medallic recognition comes about when the Prime Minister recommends the creation of a medal and the sovereign agrees and then the regulations  
30 for a medal such as the ASM say that the minister makes a recommendation to the Governor-General, who declares an operation to be non-warlike. It's not the CDF that does or the ADF that does any of that. These decisions are made by politicians and in that sense, they're political, but I don't think they're a matter for complaint.

35 It says that when the ASM is created that chiefs of service decided that certain categories of service should attract the ASM; it suggests that service outside those categories has been granted the ASM; it suggests that that's political. Well, you know, ministers as politicians have that  
40 role.

It then suggests that, going forward, certain categories of service should be recognised by the ASM and in doing that, it appears to have an internal inconsistency in that it says in every case there's a declaration by the  
45 minister of non-warlike, which seems to be an essential criteria.

5 But then in the next paragraph, seemingly inconsistently, it says, well, you can give an ASM where the minister hasn't declared it to be non-warlike. Now, the only declaration of warlike that the minister makes relates to conditions of service; it doesn't relate to medals, it doesn't relate to VEA and the paper doesn't talk about VEA.

10 So is that an unintended inconsistency in the paper? If you look at what the department put to the tribunal in its 2010-11 inquiry, it gave a list of the service that would attract the ASM. Never talks about service where there hasn't been a ministerial declaration, which suggests that that was an unintended inconsistency in the 2001 paper.

15 An alternative interpretation is, well, in every case where there has been a ministerial declaration of non-warlike we'll grant an ASM, but in some other cases, in some additional cases, we might grant and support ASM notwithstanding that it hasn't been declared non-warlike for nature of service.

20 It doesn't clearly put that view, but it's a possible interpretation. It's an ambiguity. That might be rational, in some cases, and indeed, in the '93 cabinet decision, it specifically said "conditions of service" - agreed, "conditions of service under the new regime will be for future deployments". We're not going to reopen conditions of service for past  
25 deployments. They were sorted out under the old regime.

30 Applying that same logic, you'd say, well, when you come along to look at retrospective ASMs, we're not going to reopen conditions of service, but we can look at granting an ASM, notwithstanding that it hasn't been declared non-warlike for ASM purposes. That might be a realistic policy proposition. It's not clear from the paper.

35 Then you look at the other circumstances that the paper sets out as being cases in which an ASM ought be issued. And some of those, it clearly states that in these circumstances, provided it meets the definition, and in others it seems to suggest that you can grant an ASM even if it doesn't meet. So one of those - and I think it's probably the only one - is where a service has been recognised by a foreign medal or an international medal.

40 So at the end of the day, when we look at that paper, we think, a) it doesn't talk about the double ASM; b) it doesn't propose any different definition of non-warlike; c) it doesn't say the '93 definition should not apply; and it's highly ambiguous about what it says is the way forward. So we're just in a position where that paper doesn't seem to say much of relevance.  
45

DR ROBARDS: So Chair, I'd say that the paper highlights that there has been a drift away from what you're referring to in the '93 cabinet decision and it does make a recommendation, which was agreed, in relation to the awarding of the ASM.

5

THE CHAIR: Yes, and the recommendation is ambiguous, to the extent that it tends to say, but not clearly, if there's been a drift away, let's bring it back to the '93 definition. Because if you look at the category - - -

10 DR ROBARDS: I don't think it's saying take it back to the '93 definition.

THE CHAIR: Yes, look at the categories. Some of them, at least, it says so long as it meets the '93 definition. Not in those terms, but it cross-references. There's one that's out there, this international medal thing, that seems to be an outlier. The papers just - - -

15

DR ROBARDS: I think it's expressed in quite different terms to the '93 definition, Chair.

20 THE CHAIR: Well, I don't think so.

MR KELLY: Dr Robards, could I just ask you to speak a little closer to the microphone, because I'm having trouble hearing.

25 DR ROBARDS: Sure. Yes.

THE CHAIR: So, you know, I think this is an important conversation, because on our analysis to date, of everything you've given us, is the '93 definitions, which talk about risk and expectation; they talk prospectively, not historically. There is no recommendation endorsed by government to change those definitions. There is a paper that was agreed by the minister - I don't want to downplay that, it was agreed - that I think is highly ambiguous that doesn't suggest any different definition and that is - you can't work out whether it's suggesting that the medal ought to be given in circumstances that don't meet the definition, and in other parts it clearly says that they should meet the definition.

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35

AIR COMMODORE GRADY: Chair, can we ask Dr Robards to expand on what he thinks the essence of the proposition is in that paper? You sort of suggested that it was propositioning something quite different. Can you just expand on what you think that is?

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DR ROBARDS: Thank you, so I'm making reference to paragraph 27 of that particular paper there, where it talks about the conditions or the expectations where the ASM would be awarded. It's not

45



specifically - sorry, I'm not sure if I'm too close and getting feedback now. It's not specifically looking to define non-warlike; it's seeking to define where the ASM could be awarded.

5 THE CHAIR: But bear in mind, the regulations say you can only give an ASM where it is non-warlike.

DR ROBARDS: The regulations - - -

10 THE CHAIR: So it drives you to say what's the definition of non-warlike.

BRIGADIER HOLMES: The regulations that were signed prior to there being a definition of warlike and non-warlike.

15 THE CHAIR: Yes, and came along afterwards and said in applying those regulations, these are the definitions.

BRIGADIER HOLMES: And a minister later said we are now applying this to the ASM.

20

THE CHAIR: Yes, but he doesn't say – in adopting this paper, he doesn't say there's a new definition. You can't point me to another definition. In approving this paper, the minister apparently agrees that the ASM can be awarded in certain circumstances. But as a matter of law, you can't have a

25 declaration of an operation for the purposes of issuing an ASM unless the operation is non-warlike, so you need a definition. This paper says the definitions are attached and they're the '93 definitions and 2018 didn't change that.

30 BRIGADIER HOLMES: It changed it retrospectively as you're going forward.

THE CHAIR: Yes.

35 BRIGADIER HOLMES: It didn't change it retrospectively.

THE CHAIR: That's precisely the point, and it changed it only for nature of service and arguably veterans, but not medallic. So, at the moment it would seem and it's outside the scope of our inquiry, but it would seem that

40 the '93 definition stands for medals going forward, because it wasn't changed in 2018 and there was no change in definition in this paper. So, when we come to look at what you put today as RCB service not being non-warlike, I say again it's contrary to the history up to 2007. It's consistent with the history post that date, but the history post that date doesn't seem to

give good reasons for saying that the prior history was wrong. So, that's the mindset in which we come to look at what you say today.

5 BRIGADIER HOLMES: When you say when we look at what we say today, you're referring to the 31 January submission?

THE CHAIR: Yes.

10 BRIGADIER HOLMES: And the homework that you sent for us to do to describe the assertion of facts and the nature of service against the '93 and 2018 definitions.

THE CHAIR: Yes.

15 BRIGADIER HOLMES: To sum up what you've just covered there, your terms of reference are going to expand outside the scope of medallic recognition. We're not considering air force, other personnel in ADF deployed on Butterworth 1970 to 1989.

20 THE CHAIR: We might consider – I didn't say that. I said we may consider that in the report in terms of exercising our power to make a recommendation on other matters. Bear in mind, back in 2006 Defence said RCB ought to be non-warlike for the VEA and we ought to pick up the RAAF personnel. The instruments didn't do it. Then Defence said, once it  
25 realised that, let's change them to add them in. That seems to us to be something that requires further consideration. It's not specifically within our terms of reference but we may well make a recommendation that that consideration ought to be given because the Defence position then, and I don't think you're saying anything different today, is that the RAAF  
30 personnel were performing a similar function.

BRIGADIER HOLMES: Correct.

35 THE CHAIR: Yes. So, if RCB qualifies for certain consideration, then relevant RAAF people prima facie should. It's a matter that needs consideration.

BRIGADIER HOLMES: I will keep going.

40 THE CHAIR: Yes.

BRIGADIER HOLMES: I agree with you. I don't think we should be talking about separate groups of people, although I understand the focus of today and the hearing and the inquiry is RCB.

45

THE CHAIR: Yes, RCB.

5 BRIGADIER HOLMES: But to be very, very clear, we've put submissions to you many times that if you are going to consider RCB, you should also be considering the other people deployed at Butterworth in the time period 1970 to 1989.

10 THE CHAIR: Yes, and I'm not disagreeing with you, I'm just saying we may have to do that in exercise of the second – the power and the Act, rather than exercise the terms of reference.

15 BRIGADIER HOLMES: Thank you for clarifying that, Chair. You are focused on the 1993 definitions and the nature of service to consider medallic recognition in the consideration of RCB service.

THE CHAIR: I think that's a fair summary. I don't know that that means we should disregard the 2018 definitions, although they clearly in their terms do not apply.

20 BRIGADIER HOLMES: You've just spent half an hour saying that they don't apply.

THE CHAIR: No, no.

25 BRIGADIER HOLMES: All I've done is summarise what I think that you've been saying for 45 minutes.

30 THE CHAIR: No, but we can look at them to see whether they might add anything in the interpretation of the '93 definitions and help in the identification of warlike, non-warlike peacetime service.

35 BRIGADIER HOLMES: Chair, I'd have to say and you will probably hear and I'm sure everybody else has a little frustration where you're selecting particular things to choose to consider. So, Clarke is no good, 2018 is no good but we've going to use part of 2018 and none of Clarke.

40 THE CHAIR: No, I think you're misrepresenting that. I don't choose to disregard clerk. We have full regard to Clarke but we assess what he says about his reasons for his conclusion and we don't think they are persuasive. That's clearly a valid proposition in my view. We are contemplating having regard to the 2018 definitions. I mean the CDF put them in his submission to us so we ought to think about them. When we look at them, the submission to the minister that approved them says they're not relevant to RCB or they're not applicable to RCB service. But I don't see why we  
45 couldn't have regard to what they say to see if they throw any blinding light

on how the words warlike and non-warlike might be interpreted in the regulations that we're looking at. That's the ASM, AASM regulations.

MR FULCHER: Chair, if I may?

5

THE CHAIR: I'd like to continue this because this is important. We're talking about the Defence response to the definition so let's stick with it. I will not stop you having your say later. So, have you got anything further?

10

BRIGADIER HOLMES: No, Chair, no. I just wanted to clarify the three elements of the thing that we're talking about to anchor what might be the next conversation.

THE CHAIR: Okay.

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BRIGADIER HOLMES: So, that we are very, very clear about the – well, I'm trying to get some clarity around what we are going to be prepared to talk about next.

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THE CHAIR: Yes.

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BRIGADIER HOLMES: So, it's very important to me personally, as a 40-year professional in this uniform, that we are talking about all of the people who are involved here, not just a small group, although I accept the terms of reference. You've opened those up and Defence has asked that you considered that and I was very concerned about the caveats that you are putting around those earlier remarks.

30

THE CHAIR: Yes. I am not saying we're not considering the other people.

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BRIGADIER HOLMES: No, you've made that clear.

THE CHAIR: I am saying that we might have to deal with them somewhat differently because of the legal constraints that we operate under.

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BRIGADIER HOLMES: Thank you for the clarification.

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THE CHAIR: All that was by way of history and that's why we asked you to come back to us with an assessment of the uncontested facts against the '93 definitions. So, when we look at your assessment, you say it's non-warlike and you go through the elements.

BRIGADIER HOLMES: So, the assessment in – so, what year are we now?

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THE CHAIR: No, I am talking about your January submission.

BRIGADIER HOLMES: I haven't said in there or we haven't indicated in there that it's non-warlike.

5 THE CHAIR: You say that it is not non-warlike.

BRIGADIER HOLMES: Correct.

THE CHAIR: Yes.

10

BRIGADIER HOLMES: That's not what you said a moment ago. You said it's non-warlike.

THE CHAIR: Well, if I said that, I misspoke to use a terrible phrase.

15

BRIGADIER HOLMES: It's a challenging set of words.

THE CHAIR: Yes.

20

BRIGADIER HOLMES: The definition for non-warlike is not - if the use the - - -

THE CHAIR: Let's be perfectly clear. Your January submission says in paras 2.24 to – no, sorry, 2.43 I think it is – no, I've got that wrong again. Let me get the right paragraphs, 2.24 to 2.30 that RCB service did not meet the '93 non-warlike definition. Okay. That's what you said.

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BRIGADIER HOLMES: So, you asked us to do an assessment from 1970 to 1989.

30

THE CHAIR: Yes.

BRIGADIER HOLMES: Standing in 2022.

35

THE CHAIR: Yes.

BRIGADIER HOLMES: To put these definitions against the assertion of facts and the definitions of 1993 and 2018 against each of the definitions.

40

THE CHAIR: Yes.

BRIGADIER HOLMES: Warlike and non-warlike.

THE CHAIR: Yes.

45

BRIGADIER HOLMES: Then in 2018, warlike, non-warlike and peacetime.

5 THE CHAIR: Yes, and you've done that and we're grateful to you for it.

BRIGADIER HOLMES: The context of it was you asked us to assess that and we have assessed that.

THE CHAIR: Yes.

10 BRIGADIER HOLMES: And provided that homework to you.

THE CHAIR: Exactly, if you want to call it homework.

15 BRIGADIER HOLMES: Task.

DR ROBARDS: Chair, can I just go to the '93 cabinet decision here.

THE CHAIR: Yes.

20 DR ROBARDS: You're saying that the '93 cabinet decision provided a definition of warlike and non-warlike for medallic purposes.

THE CHAIR: Yes.

25 DR ROBARDS: I actually think it's saying something different.

THE CHAIR: Well, wait until we look at the decision.

30 DR ROBARDS: I don't think it's actually defined warlike and non-warlike for medallic purposes.

THE CHAIR: It says:

35 *The recommendation or the award of medals would be aligned to the definitions of warlike and non-warlike service.*

DR ROBARDS: So, recommendation or the award - - -

40 THE CHAIR: "Or the award of medals would be aligned to the definitions", if that doesn't mean the definitions apply to medals, what does it mean?

45 DR ROBARDS: It mean that when the government makes a recommendation to the Governor-General that they would align it. So, the

regulations signed by the Queen does not actually define warlike and non-warlike.

5 THE CHAIR: No, of course it doesn't, but what it says is that when the minister makes a recommendation to the Governor-General for the declaration of an operation, he will use these definitions, he or she.

DR ROBARDS: And the minister later changed how they would make a recommendation.

10 THE CHAIR: Where?

DR ROBARDS: In 2001.

15 THE CHAIR: No, they didn't. The definitions remain exactly the same and the paper is grossly ambiguous about what it was really saying in my view.

DR ROBARDS: 1993 defined warlike and non-warlike, the nature of service.

20 THE CHAIR: Yes. The nature of service, and veterans, and medals.

DR ROBARDS: I'll hold on that last part. Defined for the purpose of nature of service, veterans' entitlements, and then said that when we make a recommendation to the Governor-General for medallic purposes, we will look to these definitions here.

30 THE CHAIR: We will align with the recommendation.

DR ROBARDS: We will align.

35 THE CHAIR: Surely that means we'll adopt the definition. I don't think it says we'll have a think about it, and then decide something else.

DR ROBARDS: It didn't define it. It said it would align.

THE CHAIR: Yes, but align to the definition.

40 DR ROBARDS: I guess the point I'm trying to make here, Chair, is the Cabinet was looking for a way to guide its future recommendations for those awards, and it later in 2001 said that we've had these other factors, and it's got a bit blurred, and so on, and that we will now look to those criteria that were outlined in that 2001 paper for the award of the AASM.  
45 The point I'm making is that it wasn't removing a definition from 1993.

In 1993 it said it would align to something later on. It's still looking to that, but it's got other factors that are taken into account.

5 THE CHAIR: Well, that's where I have a problem, because I don't think it clearly says that. I think it is a very confused, and confusing, paper. It doesn't suggest any different definition. It doesn't - it is internally ambiguous in a number of respects, and it, in some respects, says that - let me find the page - that this circumstance applies, we will support a medal in this circumstance, so long as that can be declared under the Regs.

10 DR ROBARDS: The problem that we've got is that the Medal Regulations don't define warlike and non-warlike. So the government is looking for a way to determine in what circumstances those awards should be made.

15 THE CHAIR: And it found a way in '93.

DR ROBARDS: And it added further details in 2001.

20 THE CHAIR: You say that. I have great trouble reading that into the paper, because - - -

DR ROBARDS: Well, the Minister signed it.

25 THE CHAIR: - - - complexity and ambiguity. Yes, the Minister signed it. I agree. I acknowledge that. But what did the paper actually say? What does it mean? And it's ambiguous. And it's also got a whole lot of errors in it, that would make you think well, you know, what faith can we place in this paper? I hear what you're saying. We'll give consideration to that, and if you want to make any further submission to it, please do. But after (indistinct). But let's get to what you said in your homework about how RCB service measures up against that '93 definition. Now, you say that - - -

30 DR ROBARDS: Sorry, can you tell us where you're referring to there, sir?

35 THE CHAIR: It's your submission, para 2.27, and in para (a) you quote from the definition, "There is a risk with the assigned tasks". And you say JIO has assessed the threat of Communist attack on Air Base Butterworth as low, and unlikely. And there may well be some argument about the use of those words. But that implicitly accepts that there was a risk, doesn't it? You're not saying there was no risk of attack by Communist terrorists? So there was risk associated, right? Do you disagree with that?

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BRIGADIER HOLMES: Chair, there's a risk in everything that we do.

THE CHAIR: Yes, but - - -

5 BRIGADIER HOLMES: We are utilising the - - -

THE CHAIR: I'm looking at a definition.

10 BRIGADIER HOLMES: We are utilising the available evidence in the '70s and '80s to provide advice against that phrase in that definition.

THE CHAIR: Yes.

15 BRIGADIER HOLMES: It's not asking us whether there was risk, or not. It's asking us to define what we knew at that time. It's 2022. We're looking back at records of 1979 and 1989. The risk associated with the assigned tasks, according to those assessments, was low and unlikely.

THE CHAIR: But nevertheless, a risk.

20 BRIGADIER HOLMES: I'm saying (indistinct). I would dispute that.

25 THE CHAIR: No, don't - please. I said that there can be argument about the words. Let's leave it there. You're not saying there was no risk. Do you accept there was a risk of a CT attack?

BRIGADIER HOLMES: No.

THE CHAIR: You don't?

30 BRIGADIER HOLMES: I am quoting what we have in the submission, low and unlikely.

35 THE CHAIR: Yes, yes. Low says to me there's a risk. I rate it as low, but it's a risk. The definition says there is risk. Well, that element seems to be met. The definition says "Application of force is limited to self-defence". We've had a lot of discussion about rules of engagement.

BRIGADIER HOLMES: Where are you at now?

40 THE CHAIR: The same para. You say "Rifle Company Butterworth rules of engagement were defensive". It seems that - A(2).

BRIGADIER HOLMES: Thank you.

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THE CHAIR: It seems that that element of the definition is met. Casualties could occur, but are not expected, is the next element.

5 BRIGADIER HOLMES: Let's just go back to A(2), please Chair?

THE CHAIR: Yes.

10 BRIGADIER HOLMES: You're stating things that I have on my record here of a particular paragraph, and then making a comment against the paragraph to either say you agree or disagree with what it says. Is that what you're doing now? Are you going to go through each paragraph and state I'm going to agree or disagree. I think it's rubbish. Or have a - - -

15 THE CHAIR: I haven't used the word "rubbish". I'm trying to understand what you are saying to us, and you have said at paragraph 2.30, that RCB service did not meet the elements of the 1993 non-warlike definition.

20 BRIGADIER HOLMES: Yes. The key elements of the 1993 non-warlike definition, correct.

THE CHAIR: Did not meet the elements of the 1993 non-warlike definition, is what you said.

25 BRIGADIER HOLMES: I think that is at the end in the summary.

THE CHAIR: Yes.

30 BRIGADIER HOLMES: So that's at 2.30.

THE CHAIR: Yes. That's at 2.30.

BRIGADIER HOLMES: The Rifle Company Butterworth - - -

35 THE CHAIR: Now, to get to that - - -

BRIGADIER HOLMES: - - - did not meet the elements of 1993 non-warlike definition, therefore remains classified as peacetime service. Right.

40 THE CHAIR: Yes. That's what you said.

BRIGADIER HOLMES: (Indistinct).

5 THE CHAIR: So now I'm trying to understand how you get to that proposition, and that would seem to be in the various preceding paragraphs, and you go through elements of the definition that you quote in 2.24. "An element of the definition is there is risk associated with the assigned tasks". And you say well, the assessment was low. That seems to me to be saying there was a risk, but it was low. That seems to me to be saying well, that element of the definition is met. Do you disagree with that?

10 BRIGADIER HOLMES: Sir, the '93 definitions didn't have peacetime.

THE CHAIR: The '93 definitions had - they do refer to peacetime. There's not a definition of peacetime.

15 BRIGADIER HOLMES: Yes.

20 THE CHAIR: But there is - they refer to it. They clearly say - infer that there is a third category of service, warlike, non-warlike, peacetime. The CDF in his Minute in 2018 confirms that. So I'm just trying to do this little bit by little bit, the Lego blocks. We've got two - if you go through the elements of the definition, risk associated with the assigned task. That seems to be met. You seem to confirm that.

25 BRIGADIER HOLMES: We confirm that it was low and unlikely.

THE CHAIR: Yes.

30 BRIGADIER HOLMES: But the threat assessment, so the risk associated.

THE CHAIR: Yes.

BRIGADIER HOLMES: It looks at many, many, many things.

35 THE CHAIR: Yes. Accept all that.

BRIGADIER HOLMES: The two that are highlighted here, the threat assessment being low and the rules of engagement being defensive, only for security reasons, are facts to support the assessment of that risk.

40 THE CHAIR: Yes, and so if you go back to the definition, it's non-warlike if you've got a risk associated with the assigned task, and the application of force is limited to self-defence. And casualties could occur, and are not expected. That's the elements of the definition. So if you say that there's a risk, and if you say you've got defensive rules of

45

engagement, then surely that part of the definition is met. The next bit, casualties could occur but are not expected, I don't know that you talk about casualties in your homework. But do you say that casualties were impossible if you've got an attack? I can't see how you could say that, but do you say that?

BRIGADIER HOLMES: You're asking for an absolute around many, many things.

THE CHAIR: I'm not saying they occurred, I'm saying could they occur.

BRIGADIER HOLMES: You're not saying would. You're saying could?

THE CHAIR: Yes, because that's what the definition says. Casualties could occur, but are not expected. Do you say if there was an attack on Butterworth by CTs, casualties could not occur?

BRIGADIER HOLMES: I don't think anybody could say that, Chair. No.

THE CHAIR: No, I don't think that - I think that's precisely right. And if you've said that, then the definition is met. You've got the risk. Self-defence ROE. Casualties could occur. There's the definition. It's met. The rest of the definition which talks about hazardous and peacekeeping, they are examples. They are not the only categories of service that could qualify to meet the definition. But if you go to hazardous - and I think it's common ground that peacekeeping doesn't apply. If you go to hazardous, "Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty", such as some irrelevant ones, "or other operations requiring the application of minimum force to effect the protection of personnel or property". Now, that seems to be met, and in that sense that reaffirms where we get to in the first paragraph of the definition. Yes?

DR ROBARDS: No, you finish your statement.

THE CHAIR: So I don't see how hazardous is not met. It's not an essential element because it's only an example, but it seems to be met, and that was Defence's advice in 2006 to Minister Billson. Interestingly, I note - and this is something I want to task you with some more homework - hazardous was introduced into the Repatriation Act 1920 in 1985. The Secondary Speech and the Explanatory Memorandum did not say what sort of service was to be regarded as hazardous. Left it up to the Minister. The amendments that were put into the Act simply defined it as "service declared by the Minister to be hazardous". The '93 definitions seem to

say well, for hazardous, it will be activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty. That definition doesn't say how much above the hazard of normal peacetime duty. It just says "above".

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DR ROBARDS: And similarly, my question was going to be in relation to where there is risk associated - so as Brigadier Holmes said, "unlikely." I guess I'm just looking for what would be the threshold to apply. Are you suggesting that - - -

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THE CHAIR: Well, it's not for us to say what the threshold is. We've got to work with the law and the policy. I notice that New Zealand has what seems to be a relatively sophisticated four stage process, and it has a graduation of risk, and for certain risks it gets to - certain levels it gets to our equivalent of non-warlike, and at certain other levels it goes beyond to become warlike. But it's graduated. This definition doesn't appear to be graduated. It just says "above". But the point I was going to come to was that at some stage someone, I think, in one of the subsequent NRSB reviews - I think that's where it is - inserted the words "significantly above". And I was going to ask whether there is any legislative or Cabinet or Ministerial authority - not significant, substantially - for the insertion of that word? And it was just inserted as part of a text in one of these reports, but later on it's in Ministerial correspondence, and it's put in inverted commas, suggesting that it's a quotation from something. And the phrase suddenly becomes to be hazardous, it must be substantially more dangerous than normal peacetime service.

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DR ROBARDS: Sorry, where are you referring to now, Chair?

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THE CHAIR: I'll have to find for you, and I will, where the word "substantially" first appears. But certainly in Ministerial letters that you supplied to us quite recently, signed by Minister Chester, and there was a gaggle of letters in about 2013, I think. Attachment R sticks in my mind. This phrase suddenly appears in quotes. So my question for you is, is there any statutory, Cabinet or Ministerial authority for the proposition that to be hazardous, service must be substantially more dangerous than normal peacetime service? I can't find it. It's not in Explanatory Memoranda. It's not in Second Reading Speeches. It's not in any of the Cabinet Decisions that I've seen it. One of the issues about all this is that there aren't many adjectives in the definitions. There's not much about gradation, and yet quite clearly service can go a large ambit of danger. But the documents seem to just specify sort of indeterminate the points, and don't have clear definitions of cut-over from one classification to another. The New Zealand system seems to be a bit different to the extent that we understand it.

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So as I say, looking at the definition, the 1993 definition that you say that is not met, it just seems to us- - -

5 BRIGADIER HOLMES: - - - the criteria of non-war-like?

THE CHAIR: Yes. It seems to us they are met. There was - - -

10 BRIGADIER HOLMES: The Defence position is to disagree. Your risk of attack scenario, and the way that you characterise that - if the base is attacked and the threat is low and unlikely, then that is a correct characterisation.

THE CHAIR: Yes.

15 BRIGADIER HOLMES: So you've added an element of activity against that phrase.

20 THE CHAIR: I don't think I've added anything. I think we're using the specific words of the definition. There is risk associated with the assigned task.

BRIGADIER HOLMES: Yes.

25 THE CHAIR: And the application of force is limited to self-defence, and casualties could occur, but are not expected. Now, there's going to be an argument about expectation. I'll come to that. But it seems to us that your proposition that RCB service cannot meet - did not meet the '93 definition of non-warlike, just doesn't stand. And I did say that to you in  
30 November, that we thought the contest was between non-warlike and warlike. That peacetime was not an issue. And this just, to me, confirms it.

35 BRIGADIER HOLMES: We also confirm that the comments you are making about the substantially word - it does not appear in this definition.

40 THE CHAIR: Yes. It doesn't appear in the definition, and so that's - when it suddenly gets introduced in a bureaucracy paper, and in Ministerial correspondence in quotations, I ask you where's the authority for that? If you can find it, beaut. But I can't. You'll give us an indication of where you found it.

BRIGADIER HOLMES: Yes, sure.

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DR ROBARDS: Chair, I take it that any activity has a risk. You very quickly go down the path of something being non-warlike.

5 THE CHAIR: Well, yes.

DR ROBARDS: If there's any risk at all.

10 THE CHAIR: Yes. I think in context it's got to be a risk of hostile attack of some sort. You know, when - - -

15 DR ROBARDS: Does it say that?

THE CHAIR: No. It doesn't say that. I'm saying - that's why I said "in context". I don't think it's a risk of having a motor vehicle accident while driving to the service station. I don't think - I'm not suggesting that qualifies to - - -

UNIDENTIFIED SPEAKER: (Indistinct).

20 THE CHAIR: Yes. And they've got to be military activities. It's got to be short of warlike. So it's not any activity that's got a risk that meets this definition. It's got to be a military activity, and surely RCB service was a military activity.

25 DR ROBARDS: Yes.

THE CHAIR: So but maybe I'm remiss in not having put that out there as one of the elements of the definition, but it's clear it's there. So I just - you have some questions?

30 AIR COMMODORE GRADY: I do. I just want to sort of back-task from the conclusion you reach at para 2.30, so it doesn't meet it. And I'll start with - I'll go backwards. I'm looking at para 2.27(C)(1), which is in relation to other operations requiring the application of minimum force, blah, blah, blah. Your response outlines the rationale for the establishment of the GDOC - some of its functions - and you make the point that there was no record of a security emergency being declared at RAAF Butterworth over the period. So can I clarify that by security emergency, you are referring to the fact there was never a Code Red?

40 BRIGADIER HOLMES: Correct.

AIR COMMODORE GRADY: Okay, so they're - in your mind they're the same thing?

BRIGADIER HOLMES: And classified, I understand, as the word emergency, versus the others were not - - -

5 AIR COMMODORE GRADY: Sure. I just wanted to clarify that those were linked. So it appears to me, reading this, that the logic in arriving at the fact that there was never a Code Red, is grounds for discounting the ability to comply with that part of the definition. In other words, what I think you're saying is because there was never a Code Red, and therefore never the physical application of force, you can't meet that definition. Is that actually the Defence position? So you would - to be able to meet the intent, or the spirit, behind this, "other operations requiring the application of minimum force", you would physically have to apply force. And if you don't physically ever apply force, then you cannot meet that part of the definitions. Is that what it's saying and, if not, what is it that it's saying?

15 BRIGADIER HOLMES: I'm just taking a moment to refer to the subsequent two examples that were provided.

20 AIR COMMODORE GRADY: Okay.

BRIGADIER HOLMES: Can I indulge you to ask me the question again, sir?

25 AIR COMMODORE GRADY: What I'm asking, the essence of your response is that there was never a security State Red, and so I'm asking whether your view is that because there was never an emergency, that might be by the physical application of force, that that element of the definition can't possibly be met? Is that the means by which you have reached the conclusion at para 2.30?

30 BRIGADIER HOLMES: If I might just take out "can't possibly be met", what this is giving examples of is that it wasn't met.

35 THE CHAIR: But the problem I have with that is that you've said to us a number of times nature of service is assessed prior to deployment.

BRIGADIER HOLMES: And you've asked me to look at it from a - - -

40 THE CHAIR: Yes. I'm asking you to look at it in today's - I'm asking you to look at it today by reference to the definition as it stood then, which means it's looking at - - -

UNIDENTIFIED SPEAKER: As it's from 1993 - - -



5 THE CHAIR: - - - the definition is - the fact that things didn't happen is not relevant in the definition. It doesn't talk about service is warlike or non-warlike if certain things happened. It talks about service being warlike or non-warlike, based on risk, expectation, possibility. So in this and others, you've, in your homework – shouldn't use that phrase – you've - - -

BRIGADIER HOLMES: It was substantial.

10 THE CHAIR: Yes, you - - -

BRIGADIER HOLMES: Sorry, wrong word. There was a lot to do, Chair.

15 THE CHAIR: Yes. And we value it. But you consistently talk about what actually happened. But the definitions don't talk about what happened, the definitions are prospective, they're about risk, they're about the nature of rules of engagement, and they're about the expectation or prospects, the possibility of casualties. So the fact that it didn't happen seems to me doesn't change the nature of the service, properly assessed by reference to the definition.

20 BRIGADIER HOLMES: I just want to be absolutely clear that we're talking about the same thing, because I'm not quite sure that we are. The task that we were given was to provide a detailed in-depth analysis of Rifle Company Butterworth service by reference to the uncontested assertions of fact and the terms of each of the definitions.

25 THE CHAIR: Yes.

30 BRIGADIER HOLMES: Right? So to do that we've utilised, as all of the submissions do, the historical record.

THE CHAIR: Yes. And a lot of that - - -

35 BRIGADIER HOLMES: So the historical record is the anchor point, we agreed that we were going to use that.

THE CHAIR: Yes.

40 BRIGADIER HOLMES: Submission 66 and the thousand pages - - -

THE CHAIR: The historical – you've got to pick from the uncontested facts those that are relevant to the definition.

45 BRIGADIER HOLMES: Or that favour a particular definition.

THE CHAIR: No.

BRIGADIER HOLMES: Or that provide an example of the definition - - -

5 THE CHAIR: That are relevant. Now, look, I don't think it's contested by anyone that there wasn't a counter-terrorist attack on the base. But that is an historical fact, but is it relevant to the definition? The definition talks about risk expectation. So that's a fact, but it's not relevant to the definition. There's a lot of uncontested facts about what they were told and what they  
10 were expecting and so on and so forth in the pre-deployment briefing. Those things may be relevant. But what actually happened, I don't see how it's relevant.

15 AIR COMMODORE GRADY: I'm just going back to the question, I'll paraphrase it as simply as I can.

BRIGADIER HOLMES: No, no. I guess what has been provided here in terms of an answer is in the framework of the historical record.

20 AIR COMMODORE GRADY: No, no. I accept that. But the logic that allows you to arrive at the conclusion at para 230 seems to indicate that by virtue of there never having been a security code red, that element of the definition is not met. Is that the Defence position?

25 BRIGADIER HOLMES: That's the way that we answered the question, as it was posed, using the historical record.

AIR COMMODORE GRADY: So that's a yes?

30 BRIGADIER HOLMES: Yes. We were not in a position to discount all of the historical record, and start from 1993, 2022, right. So the thing that you asked us to do - - -

35 AIR COMMODORE GRADY: I understand that. But in essence what you're saying is that because there was never a code red, one cannot possibly meet that element of the definition, the application before you.

40 BRIGADIER HOLMES: There are many examples that are articulated in this document beyond that one example, there are another nine paragraphs - - -

AIR COMMODORE GRADY: All right, but I'm referring to your response. You've provided a response that basically says, "In relation to that element of the definition, there was never a security code red." Ergo,  
45 jump forward to para 230, the definition was not met. Now, you've also

5 discounted the ability to meet the hazardous service by virtue of the low and unlikely above – we’ll come to that in a moment. But you seem to have discounted it on two bases, one of which is there was never a security code red, and further above that, that there wasn’t a risk associated with it, as we’ve already addressed.

10 Let’s just draw a line under this one, because I think you’ve acknowledged that the Defence position is that, because there was never a security code red, that element of the definition can’t be met. That’s what you’ve just indicated.

15 BRIGADIER HOLMES: In the context of the question that was put to Defence and the way that it was framed, for using the information retrospectively.

20 THE CHAIR: Look, let’s be quite clear, I don’t think we’re criticising what was written, we’re not suggesting that what you said in this document was wrong, there is a question about whether it changes the application of the definition to RCB service. So - - -

AIR COMMODORE GRADY: I’m just trying to understand the logic in your response.

25 THE CHAIR: Yes. So the definition speaks prospectively. Now, we’ve all, and this Tribunal frequently has the difficulty of applying tests that may be prospective in nature where you have the benefit of hindsight.

BRIGADIER HOLMES: The nature of service is - - -

30 THE CHAIR: We know that there wasn’t an attack. And we know - - -

BRIGADIER HOLMES: The nature of service is determined before the operation occurs.

35 THE CHAIR: Yes, exactly. So for the definition of nature of service, you’ve got to look at it prospectively. And so you don’t know that there’s not going to be an attack.

40 BRIGADIER HOLMES: Right.

45 THE CHAIR: You see that there’s a risk of an attack and you assess the level of the risk. Depending on the level of the risk you might have an expectation of casualties or you might think there’s a possibility. You’re probably not going to think there’s an impossibility. You’ll write your ROEs by reference to your assessment of the risk.

BRIGADIER HOLMES: Right.

5 THE CHAIR: But you're doing all the prospectively. And then – that's  
nature of service. And then we've got a Cabinet decision that says you'll  
use the same definitions, these prospective, focused definitions for VEA  
and medals. That's, I accept, subject to your proposition that the  
10 government somehow changed that in 2000, 2001 with the where are we  
going paper. And you've heard our views on that, and if you want to say  
more about that in a later submission, happy to receive it. But be aware that  
at this stage we don't think that holds.

15 So as I say, we're not criticising the fact that you've put these things in  
there, but when I got to those parts of the paper, I wrote, "So what."  
Because it doesn't change the prospective nature. Knowledge of hindsight  
doesn't change the assessment that was – that would have been made  
prospectively.

20 DR ROBARDS: Chair, I guess in relation to that, the two examples that  
are provided under that (c) hazardous paragraph, so it then goes on, (ii)  
examples of the activity. Different post-activity reports that are made  
during that 20 year period that's in consideration. So it's – this is not  
looking in hindsight, this is looking at - - -

25 THE CHAIR: Things that happened during, yes.

DR ROBARDS: - - - specific reflections during that period of time.

30 THE CHAIR: Yes. Accept all that. And we accept - - -

DR ROBARDS: But that element of it is not looking back in hindsight and  
going, "Hey, GDOC was never called out."

35 THE CHAIR: Yes.

DR ROBARDS: In reference to was this hazardous, we've highlighted a  
couple of examples there.

40 THE CHAIR: And equally, at the time that – if someone had been doing it,  
they – a prospective assessment was made in 1970, people would have  
known that there were air force personnel living off base, that they had  
families with them, that there were or were not restrictions on what they  
could do, and all those sort of things. But the definition says, "We've got a  
military activity, short of warlike operations, where there is a risk associated  
45 with the assigned task, where the application of force is limited to self-

defence, where casualties could occur.” That’s the test. And I don’t think any of those facts that were known at the time would have changed the assessment that would have been made prospectively. We’re all doing this after the event. That’s the nature of our job, we’ve got to do it.

5

So I have to say to you that we think your contention, that RCB service does not meet the ’93 definition of non-warlike, is not right. We can’t accept that. The question whether it is warlike, which is what the veterans are seeking, is a quite separate issue and we can move on to your January submission in that regard. Is that a - -

10

AIR COMMODORE GRADY: I’m happy to move on, yes. The question I was going to ask applies equally to warlike.

15

THE CHAIR: Yes. It’s 1045, do we want a break for 15 minutes, stretch legs and have other forms of comfort?

BRIGADIER HOLMES: Good idea.

20

THE CHAIR: And then come back at 11 and we’ll kick on. Just looking forward, I think we’re realistically going to have to wrap up at about 3 o’clock, because I know there’s people have to meet planes and so on. So we will have only a short lunch break, and we’re going to have to try to cram a lot in. But I think a deal of what we’ve done so far, it’s all valuable, and I think it covers a number of the items on the agenda. While we’ve been focusing on that first assessment against the ’93 definition, I think it does extend out to some of the others. Okay.

25

30

**ADJOURNED**

**RESUMED**

35

THE CHAIR: Just before we leave non-warlike, Mr Fulcher was wanting to say something and I put him on hold.

MR KELLY: Me as well, chair.

40

THE CHAIR: All right. So long as it’s brief.

MR KELLY: I only know brief.

THE CHAIR: Okay. Mr Fulcher.

45

MR FULCHER: Yes. Thank you. All I was going to say when I interrupt – or tried to interrupt was that the veterans have never denied that the RAAF were involved in this. That should be included in this. We’ve always argued that they should be included, and they were included for the AASM.  
5 So there’s that. The other thing was about the 2018 versus 1993. I agree with the chair. The – because the ministerial advice says that the nine – the 2018 don’t detract from the 1993 definitions but they do provide extra clarification on how that to be interpreted, basically.

10 THE CHAIR: Yes. All right. Thank you. For what you said, and for being brief. Mr Kelly, you wanted to - - -

MR KELLY: I wish I was going to be as brief as Mr Fulcher but – Chair, on your bottom history, the terms of reference of *Moore v Clarke* didn’t  
15 extend to 1989 in its determination of service at RCB. Only the very start of it. But the entire period that RCB claims have been made has been characterised by Defence, and this is the case for *Moore v Clarke*. *Moore v Clarke* could only operate on what information was provided to them, as any inquiry can. Defence has characterised their part in all of this by not  
20 being able to find information. By withholding information, I believe. And not being full and frank in their disclosures. We’ve provided information that they can’t find, yet it’s their information.

The reference to the comments that the earlier submissions by RCB claimants that they were, you know, selective and junior officers and that sort of stuff, very similar to the New Zealand response prior to the more recent review where there was written in one report, “How dare these fellows challenge the decision of a senior officer”. Then when New Zealand took it out of – away from the Joint Working Review, they  
25 suddenly had a change of heart. The only other thing I was going to say was that Moore’s approach was – and I agree with this – where there’s an anomaly or an ambiguity, don’t punish the digger on the ground.

30 THE CHAIR: Okay. Well, we’ll take those comments, and I’m sure Defence would disagree with some of what you - - -  
35

MR KELLY: I’m sure.

40 THE CHAIR: - - - said in characterising their approach. I just would correct you. Moore terms of reference did limit it into FESR.

MR KELLY: Yes.

45 THE CHAIR: Clarke didn’t. Clarke was – could and did range up to what was then current day. I don’t think Clarke had a limitation.

MR KELLY: Oh, I beg your pardon.

THE CHAIR: Yes.

5

MR KELLY: I'll withdraw that.

THE CHAIR: So Clarke, I think, did consider the full period of CB service. Mr Marsh, I'll give you 30 seconds.

10

MR MARSH: Oh. All I was going to say, when you were talking before and (indistinct words) with my glasses, you've obviously read the stuff that goes back to 2001, and in the 2001 report there's correspondence with an Air Commodore McClellan that talks about the recommendation for the ASM, to 1989.

15

THE CHAIR: Yes.

MR MARSH: Being consistent with CEDA principle 3.

20

THE CHAIR: Yes.

MR MARSH: Being in accord with that medals policy.

25

THE CHAIR: Yes.

MR MARSH: And they also – it says consistent with the important principle established by Moore J that, if persons are exposed to a threat identified by an intelligence agent, it has to be operation service.

30

THE CHAIR: Yes.

MR MARSH: That was what Defence said in 2001. I have seen no evidence or very scant evidence since that Defence has even acknowledged the rationale for that 2001 award.

35

THE CHAIR: Okay. All right. Thank you for being brief.

UNIDENTIFIED SPEAKER: Mr Chair.

40

THE CHAIR: There's a gentleman up the back, so long as your brief.

UNIDENTIFIED SPEAKER: Can I have 30 seconds, please.

45

THE CHAIR: Yes.

UNIDENTIFIED SPEAKER: To all of the (indistinct words) confirm something. The meaning of the word ‘align’ as per the Oxford Concise dictionary. “Align something with something to arrange something in the correct position, or to be in the correct position in relation to something else, especially in a straight line”.

THE CHAIR: Okay. Thank you very much.

BRIGADIER HOLMES: If I might, Chair?

THE CHAIR: Yes.

BRIGADIER HOLMES: So we acknowledge the remarks of the veterans and accept their view of the criticism.

THE CHAIR: Yes.

BRIGADIER HOLMES: It’s up to them to state their views and we appreciate that it’s difficult. We had some difficulty with the last conversation in particular and I’m keen just to highlight one particular thing around that if you wouldn’t mind.

THE CHAIR: Yes.

BRIGADIER HOLMES: And then – we seem to have skipped over the rules of engagement piece in the example of risk, which I’d also like to just highlight one particular element of that. But maybe you’ve already got that under consideration, based on the documents we gave you yesterday - - -

THE CHAIR: Mm-hm.

BRIGADIER HOLMES: - - - around the quality of the rules of engagement and the things that were missing from the rules of engagement. Namely, identified enemy, declaration of war, and so on, and so on.

THE CHAIR: Yes.

BRIGADIER HOLMES: So we might get to that in the next conversation anyway.

THE CHAIR: I think undoubtedly, we will.

BRIGADIER HOLMES: Okay. So - - -



THE CHAIR: I mean, there's been a lot said about rules of engagement.

BRIGADIER HOLMES: Yes.

5 THE CHAIR: And I don't particularly want to repeat all that, but there are relevant issues, yes.

BRIGADIER HOLMES: So while it's on your assertion of facts that are listed and that we'll get to, I'm sure we'll get to it again.

10

THE CHAIR: Mm-hm.

BRIGADIER HOLMES: Yes. So we're currently prepared in Australia for an exercise called TALISMAN SABRE. An exercise involves others nations. It's being conducted in Australia. It's going to be very, very large, involve all services, and whatever else. So it's a military activity short of warlike operations where there is risk associated with the assigned tasks, and the application of force is limited to self-defence and to a number of other things. But it's an exercise and reflects exercises that we've done and continue to do.

20

So I go back to my earlier point and my challenge around being asked this question - or Defence being asked this question to put against the 1993 definitions in 2022 a prospective view and lens on 1970 to 1989. But we're in an area where we've been asked to talk about risk, and you've asked me about risk in today's parlance and language, and we're about to conduct a very, very expensive and expansive exercise, 13,000-plus-odd troops, sailors and aviators, and meets that definition of a sense but doesn't meet all of the other things. So I guess my challenge is that we're going to now consider medals for every exercise. The service - - -

30

LIEUTENANT COLONEL MICKELBERG: (Inaudible words.)

BRIGADIER HOLMES: The service - so my challenge here is that you have reduced this definition down. Boiled it down to a particular thing, in a particular context. I've just looked at it from my context, and it's very, very similar but for a completely different thing.

35

THE CHAIR: Yes.

40

BRIGADIER HOLMES: Now - - -

THE CHAIR: Sorry - - -

45 BRIGADIER HOLMES: This exercise is being conducted in Australia.

THE CHAIR: Mm.

5 BRIGADIER HOLMES: By the rounds carried, a large amount of risks and other things. Soldiers issued all of the things. They will have defensive ROE as a part of it. But I'm struggling with the difference.

THE CHAIR: Well.

10 BRIGADIER HOLMES: The way that you have defined it.

THE CHAIR: Yes. No, no. Sorry. It's not the way I have defined it. It is the way Cabinet defined it. Presumably on Defence advice. Because that – the Cabinet decision reflected a ministerial submission, and I've not  
15 known in all my years a ministerial submission of that nature to have been written without departmental advice. Those sort of things don't get written in the ministers' offices. So I'm assuming, unless you can demonstrate otherwise, that '93 Cabinet decision that adopted the minister's submission was consistent with – prepared by and consistent with what Defence was  
20 putting at the time.

But in terms of your exercise, two things. Firstly, it will be judged according to the CDF's minute to the minister, and the minister's approval, by the 2018 definitions. Not the '93 definitions. And how you apply those, a matter for you beyond our terms of reference or our care. So that's up to  
25 you. I accept – and I said before – these definitions may not be brilliant. They – you know, if we were writing them now, we might write them differently. But they're what's there. Subject only to Dr Robard's suggestion that somehow the 2001 paper changed them. But that's the only  
30 definition that we've got. The regs speak about warlike and non-warlike. You say the '93 definitions aren't applicable. Well, what definition do you say we apply in their stead, and how does it apply to RCB service? I mean, you know, we can't just make it up as we go.

35 So I accept your point that it's very difficult and, you know, on one reading, if you were applying this definition which clearly inapplicable to your exercise, you might be prospectively declaring it non-warlike. Your exercise. Or even warlike. I don't know. But it's outside our inquiry.

40 BRIGADIER HOLMES: So just to follow that line of logic, if, in the 1993 parlance and these definitions, the operation being considered doesn't meet any of – or either of the definitions, it is then regarded as peacetime.

THE CHAIR: Yes.  
45

BRIGADIER HOLMES: Right. So in this particular case the Defence position is: doesn't meet warlike. Doesn't meet non-warlike. In nineteen – against the 1993 definitions. So therefore - - -

5 THE CHAIR: And I accept your position that, if it doesn't meet non – and warlike – and we haven't talked about that – if it doesn't meet non-warlike, you would quite properly assert that it was peacetime. That - - -

BRIGADIER HOLMES: That is the Defence position.

10

THE CHAIR: Yes. We understand that. Have always understood it. What we're saying to you is, as things stand, we think your proposition that it's not – non-warlike can't stand, and so it can't be peacetime. Whether it's warlike is the big question. And in all of this, the big question is, is it warlike, because that's what the veterans are seeking. They're seeking AASM and the veterans' entitlements that go with warlike. So in a sense, this peacetime, warlike, non-warlike discussion is not the critical discussion, but it's clearly relevant, and it's – it was put to us by the CDF in his submission, and it's been consistently, for a number of years, been put by Defence in its responses to RCB veterans. So, you know, that's why we've been looking at it. Okay. So let's - - -

15

20

BRIGADIER HOLMES: Can I clarify one last point.

25

THE CHAIR: Yes. Let's.

BRIGADIER HOLMES: So from a nature of service perspective, I've been talking about all nature of service consideration being prospective.

30

THE CHAIR: Mm-hm.

BRIGADIER HOLMES: My staff have clarified that occasionally when the government directs Defence to prepare capability for operations and then prepare the records, statuses of forces agreement, rules of engagement, all the artefacts that are required, instructions and orders that are required, that on occasion the completion of the nature of service preparation might occur after that operation has started, in particular with regard to some of our capability which is on short notice.

35

40

THE CHAIR: Yes. And - - -

BRIGADIER HOLMES: So that deploy – so just to be absolutely accurate, it isn't something we're always able to achieve, and all the pieces don't fall into place immediately before the first person deploys. But certainly, that

is the intention to do so, and there is, in the preparation of those documents.  
And - and the preparation - - -

THE CHAIR: I - - -

5

BRIGADIER HOLMES: - - - takes time.

THE CHAIR: Thank you for the clarification. I always understood that  
that would be a situation. In a perfect world, one gets things done in  
10 advance. But the world's not perfect. And then of course, always, you  
know, there's been a number of retrospective reclassifications of service,  
and whether they've been done for terms and conditions - you know, nature  
of service - I don't know. But they would certainly have been done for  
veterans and medals. So, retrospectively considering these issues is  
15 certainly not uncommon.

BRIGADIER HOLMES: Yes.

THE CHAIR: Okay. Let's move on to what you said about whether RCB  
20 service would meet the '93 definition of warlike. Do you want to take the  
running?

AIR COMMODORE GRADY: Yes. I'm hoping we can skip through this  
25 very quickly. I just want to address the elements of the definition against  
your response. There was a long discussion yesterday about ROI and the  
use of force. So, against the definition that the application of force that was  
authorised, I'm assuming that you can assume or agree that force was  
authorised.

BRIGADIER HOLMES: Yes, force was authorised for self-defence in a  
30 very limited way; however, the rules of engagement are absent of many key  
elements that indicate - - -

AIR COMMODORE GRADY: Yes. But with respect to do you agree or  
35 not agree that the use of force was authorised, the answer is? I'm hearing  
yes.

BRIGADIER HOLMES: Within the ROE?

40 AIR COMMODORE GRADY: No, copy the caveat.

BRIGADIER HOLMES: Yes.

AIR COMMODORE GRADY: All right. Moving on to what I think is  
45 probably the more important part and this is I suspect the area that you've

5 taken issue with and that is that Rifle Company Butterworth was not authorised to conduct offensive operations or to use force to achieve military objectives. I want to just focus on the terminology of military objective. In your response, you have provided a definition that's formed from the ADF glossary which refers to military objectives as legitimate objects of attack. I agree that that is a definition in the ADF glossary. I'm just wondering in formulating your response whether you cast the net more widely or arguably more relevant definitions of military objectives.

10 I'm referring here to two aspects of ADF doctrine, that would be ADF P5 planning and ADF P3 campaigns and operations where in both of those documents they open the aperture to be more than an object but to include the concept. In other words, a military objective would be aligned with the concept of things like a military strategic objective or a national objective, 15 where those things are often described as the ability to achieve an end state, rather than to physically capture or kill an object.

20 So, the question is, did you consider whether there were other more relevant definitions that in the first instance would allow the ability to comply with that definition? You seem to have discounted it because it's not a military object. You're saying that they didn't have – they weren't able to pursue a military objective. I'm saying objectives can be expressed conceptually, i.e., the defence of RAAF Butterworth, for example, or words that capture the essence of that. Could it not be described as an objective?

25 BRIGADIER HOLMES: The two doctrine that you quote were not utilised directly for this particular matter because we are talking about Rifle Company Butterworth. Both of those documents referred to political and strategic and national intent of achieving a particular aim and the way that 30 military forces utilised by government, by Defence, by navy, army and air force and then you break that down in the preparation of orders, plans and directives. So, that military objective I think is clearly stated in the status of forces agreement which talks about training and support to the Malaysian Government in the ROE, which really sanitised down Defence of only 35 doing very, very limited things.

40 Now, if you want to talk about those other larger military objectives, we look at then the political and strategic reasons why the government was saying we are going to support the Malaysian Armed Forces develop their capability in a number of ways. We are supporting in that those objectives are being conducting training with the Malaysians, although from what I understand, in very limited ways, but available to do so and to provide them strength while building their own forces. Those things are deliberately in ADFP 5, being a joint document, which also includes the other agencies of 45 government.

AIR COMMODORE GRADY: Sure.

5 BRIGADIER HOLMES: It talks about the strategic and political imperatives required for those objectives.

AIR COMMODORE GRADY: It includes more than that.

10 BRIGADIER HOLMES: For Rifle Company Butterworth it includes - - -

AIR COMMODORE GRADY: It includes more than that. Let me quote to you exactly what ADFP 5 Planning says. It says:

15 *A military objective is a condition that needs to be achieved ... A military objective may be tactical, operational or strategic.*

20 So, in terms of it being limited to strategic or higher order considerations, that is not the doctrinal position. It is possible to have a tactical military objective; is it not, for doctrinal indicators?

25 BRIGADIER HOLMES: That document still is capstone doctrine and allows then the writing of different service doctrine to support, in the hierarchy of doctrine controls, the way that documents are read. You then have the breakdown of each of those documents which talks to the definitions.

AIR COMMODORE GRADY: So, against the definition here, you say:

30 *The application of force was authorised as expressed through the rules of engagement, was defensive in support of security tasks, limited to the confines of Air Base Butterworth and not designed to pursue military objectives.*

35 So, I am challenging the last phrase there, “not designed to pursue military objectives”. I am putting to you that there were tactical level objectives that were implicit in RCB’s tasks for a start. I am seeking to challenge that part of it. I haven’t heard anything from you now that disputes that. What I’m suggesting is that the Defence position that it was not designed to pursue military objectives is too narrow an interpretation that’s written around a  
40 very traditional definition of military objectives.

BRIGADIER HOLMES: Interestingly, - - -

45 THE CHAIR: Sorry. No, I don’t want to cut you off if you were going to respond to the air commodore.

BRIGADIER HOLMES: I'm going to get him to ask the question again because he jumped through a range of different time periods utilising particular doctrine that applies to a completely different group of folk. But I will just say – well, my first question is, what year are we in? Are we applying 2020 doctrine, I think that is, 2018 doctrine to 1970.

AIR COMMODORE GRADY: Well, we're in exactly the same year that you responded to us suggesting that they did not use force or weren't authorised to use force to pursue a military objective.

BRIGADIER HOLMES: Correct.

AIR COMMODORE GRADY: You provided a very narrow, in my view, definition of what a military objective is. I am simply suggesting to you that there are other broader definitions that are drawn from capstone doctrinal documents in the Defence that are not so restrictive, and that in taking these other definitions, I put it to you that the RCB was authorised to use force to pursue military objectives. That's simply what I'm saying.

BRIGADIER HOLMES: If the strategic military objective is to be in location to provide security and - - -

AIR COMMODORE GRADY: No, I'm talking about the fact that it is a tactical military objective.

BRIGADIER HOLMES: - - - to support the objective, to be in location to support training and to support security of ADF assets as the military objective.

AIR COMMODORE GRADY: I agree. I'm suggesting to you that a tactical military objective is implicit in part of your planning here and by necessity should be aligned with other higher order objectives, some of which might be military strategic objectives.

BRIGADIER HOLMES: I agree.

AIR COMMODORE GRADY: But there could be a thread that one can follow that comes from a national objective down through the military and eventually resides in the articulation of tactical objectives.

BRIGADIER HOLMES: Agreed.

AIR COMMODORE GRADY: So, what I'm suggesting to you is that you appear to have cut off the ability to align to that definition by saying that

our view of a military objective is a legitimate object of attack, and I'm suggesting to you that there are conceptual objectives that are implicit, even in the defence of Butterworth. So, I think you're being potentially premature in saying that you cannot meet that element of the definition.  
5 That's what I'm saying.

BRIGADIER HOLMES: No, Defence disagrees. We have utilised the glossary definition and that is closely aligned to what we think would have happened, being the doctrinal piece in 1970.  
10

THE CHAIR: That definition that you quoted, the glossary.

BRIGADIER HOLMES: Yes?

15 THE CHAIR: Was that in force in '93 when the definition was written?

BRIGADIER HOLMES: I can't confirm that for sure.

20 THE CHAIR: Yes.

BRIGADIER HOLMES: I would have to go back and seek that as a request for information.

25 THE CHAIR: If you would.

BRIGADIER HOLMES: I'm fairly confident that this definition would be very similar.

30 THE CHAIR: Okay. I mean what we've got to do is to try and interpret the words as to what they were intended to mean by the people who wrote them what I find interesting. Is that when I read the word objective, I think aims. Now, this definition isn't about aims. It's about targets. It's about the objects you act on, and the other thing that that I don't quite understand is the meaning of the word pursue if that is pursue in a  
35 proactive go beyond the base, find them kill them...In that sort of way the ROE didn't do that. But once there was an attack or if there had been an attack on the base, then I would've thought that there was an objective in the sense of aim to defend the base and I would've thought that within that definition, there would've been objects in the sense of the definition,  
40 combatants, who are attacking in a military capacity, and are willing to fight, and that the ROE would authorise pursuit at least to the perimeter of the base maybe not beyond. Query whether someone stepped beyond or outside of the fence whether you could shoot them, but you certainly couldn't go haring off beyond the base, wherever they might be in the



country. So I'm just having a little bit of difficulty understanding the concept pursuing military objectives.

5 BRIGADIER HOLMES: Chair, you've asked a number of questions.  
They're the definition of an objective and the definition of objectives and  
the definition that the veterans would utilise based on their doctrine of the  
objective, or the pursuit, or the words to pursue are all very, very different  
terminologies to a military person, and the way that we would apply those  
10 things in all three services so we can get you those definitions and explain  
them to help with that clarification, but to answer Air Commodore  
Grady's particular question, the definition that we utilise was the glossary  
definition, as we stated it is anchored on the high-level document that  
you've identified which is anchored on the laws of armed conflict, and the  
15 understanding of how to apply force and discipline for the application of  
force. The idea is to limit not open up. It's not an application of a  
military force. It's about doing less, not doing more. So pursuing in  
following and chasing not self-defensive ROE. It's not what we are  
allowed to do. It's not the orders. Now the experiences of the veterans  
20 might be different, but that's not what the ROE and the orders say, how  
that is interpreted by low-level commanders and the things that they have  
done and the interpretation have, and the experience of the veterans, no  
argument. The orders that are in the standing orders and standing staff  
instructions from the chain of command from the earliest days and  
throughout, give those limitations based on high level doctrine and the  
25 objective that the definitions that are used based in around that framework.

THE CHAIR: I think and I'm not signalling in any way a concluded  
view, It's a question, and if you're able to provide an answer or any more  
material to clarify it, I'd be very grateful. My question really is accepting  
30 what you say about the ROE when there's not an attack, once there's an  
attack, doesn't there become a military objective been to protect the base  
and personnel, and isn't the pursuit, then authorised, at least up to the  
boundary point? And I'm just trying to get my head around the English,  
which may be not ordinary English usage but trade terminology that's  
35 really where I'd appreciate your assistance. Do you understand what I'm  
getting to?

BRIGADIER HOLMES: I think so Chair.

40 THE CHAIR: Good thank you.

BRIGADIER HOLMES: The rules of engagement are particularly  
limited, delivered from government broken down through the chain of  
command, and given instructions that limit that use of force and those  
45 limitations don't extend to so there are limitations.

THE CHAIR: So I suppose in a sense what you're putting would be a but more obvious, if the definition said rules of engagement go beyond self defence.

5

BRIGADIER HOLMES: So if there is a requirement to do so they would be stated so the rules of engagement are limited to self defence.

THE CHAIR: I'm talking about the definition. I'm not talking about what is written in ROE. So as I say, if you can assist me in that regard or us in that regard, we would be grateful.

AIR COMMODORE GRADY: So my original line of questioning was putting to you that you have used a particular definition of military objective. I'm asking if there are other definitions of military objective here that are equally relevant, and those being the doctrinal ones that are – where the military objective is expressed conceptually.

BRIGADIER HOLMES: That is how the hierarchy of doctrine and the way that our Defence Force operates, that's consistent with that. And those high level definitions are broken down into language that our combat forces utilise every day.

AIR COMMODORE GRADY: So that's a yes?

BRIGADIER HOLMES: Yes.

AIR COMMODORE GRADY: You agree that there are other relevant interpretations of that.

30

BRIGADIER HOLMES: There are.

AIR COMMODORE GRADY: Moving on to your para 219, which deals with the expectation of casualties. This is on the second page of your submission. You state:

35

*There's no documents indicating an expectation of casualties within Rifle Company Butterworth.*

40 You go on to say, "Or any other ADF members or families." By that you mean you haven't found any documents that articulate an expectation of casualties. That's not to say that they didn't ever exist, you're just saying you haven't found them.

BRIGADIER HOLMES: Chair, Air Commodore Grady, we've said right from the outset that we have given you all the things that we have found to date, but can't guarantee there isn't more, we have many experiences where there's always more. Submission 66 is a great example of there's always more.

THE CHAIR: Yes.

AIR COMMODORE GRADY: Well, under current arrangements, i.e. today, what is the means by which the ADF calculates the expectation of casualties or not? So you've got an operation coming up, at some point the ADF will need to form a view as to whether casualties are expected, what is the mechanism, the process that you run with that?

BRIGADIER HOLMES: I'm not qualified to answer that question and we would have to take that on notice, I think. I don't know of anybody here with us today who can – just give me a sec – not covered by a military legal service, that is currently conducted in Joint Operations Command and we'd have to get expertise from there to be able to answer a question like that.

AIR COMMODORE GRADY: But is it fair to conclude that there is a process? And at some stage Defence forms a view about the expectation of casualties? Or is that a process that seems so vague that no one knows much about it?

BRIGADIER HOLMES: Well, not at all. Certainly not vague. The veterans have already highlighted the risk management and risk assessment processes that are conducted as a part of normal military planning. Military planning and advice to government would always include comments that would regard the likelihood of casualties or damage to military and Australian property. That would be a part of briefings to government as part, of course, through the Minister. But I am not qualified to provide the details of that mechanism.

AIR COMMODORE GRADY: I'm not seeking the details, I'm just after its name. Is it, for example – does the military threat assessment form part of the calculus?

BRIGADIER HOLMES: I'm sure it would.

AIR COMMODORE GRADY: Started to touch on this previously when we were discussing non-warlike. I'm referring here to your para 219 where you quote, "The overall risk associated with RCB security and training tasks was low," and later on elsewhere in the document you refer to low and

unlikely, which is an expression of the likelihood of attack and the threat loading.

5 But the point you make is that the source of the threat assessment of low is coming from JIO. Do you have a reference for that? I ask because I've been through all of the JIO material that I have and I cannot find reference at any point to a threat assessment of low. I note that submission 96, I think, which is the CDF's submission, actually does refer to the threat being "continually assessed as low," but I'm just wondering what JIO document 10 it is that you're referring to that actually expresses that as low.

BRIGADIER HOLMES: I'll take it on notice, thank you.

15 AIR COMMODORE GRADY: That's all I've got for the moment there, thanks, Chair.

THE CHAIR: Okay.

20 BRIGADIER HOLMES: And you're referring, just to be absolutely clear, the two bullets above paragraph 220?

AIR COMMODORE GRADY: Let me just pull it up. If you want a quote, it's mentioned a number of times, but take it as the second bullet point there on – it's yes, the two bullet points there.

25 BRIGADIER HOLMES: Above 220.

AIR COMMODORE GRADY: Yes, above 220.

30 THE CHAIR: I think we would now throw the floor open to the veterans. You've seen and heard what Defence has said about warlike as against the '93 definition, we'd welcome your views.

35 LIEUTENANT COLONEL MICKELBERG: So I wanted to follow on from what the air commodore was asking some questions about in relation to military objectives, and I completely agree with his assessment that it can be done at the tactical level, and indeed it was done at the tactical level by the base commander, and I would quote OPORDER 1/71:

40 *Mission: To protect operational assets, property and personnel within the perimeter of the Air Base Butterworth by joint arrangement and mutual support.*

45 That was his military objective, right. And then the subsequent tasking that RCB and RAAF personnel, follows on from that. In other words, that

tasking is his way of implementing his military objective, which he calls his mission. And ultimately anyone whose done any military education and training would know that the mission is the objective at the tactical level.

5 The other point I'd make is that the doctrine that the air commodore was seeking reference to is ADFP 5.0.1 edition 2 AL 3 dated 15 August 2019, which talks about the joint military appreciation process and goes in and talks about the use of the operational risk management process, which started in about 2017, following the black hawk incident. That was an  
10 outcome of the inquiry that was convened as a result of that incident.

Before that, there was no formal assessment of the expectation of casualties, this was something that was done subjectively by commanders when they were putting together their plans. Certainly in army, can't speak for air  
15 force and navy.

THE CHAIR: Right.

MR FULCHER: Yes, I think that in this definition "pursue" has its ordinary  
20 meaning, like you are attempting to accomplish something. Forgive me if I've misunderstood Defence. It's not about chasing people, although it can be about chasing people, whether it's to the fence or beyond. Offensive action is not what it's about there, it's just you are trying to accomplish something, you're continuing to try to accomplish something, you are  
25 pursuing your goal, pursuing your objective.

And I think that the – what Defence refers to comes from the law of armed conflict, that it's abbreviated, the glossary is abbreviated. And if we refer  
30 to the law of armed conflict, it says that:

*Military objectives are 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 –*  
35

Blah, blah, blah. But it goes on to define what a location is. And it says that:

*These include areas which are militarily important, because they must be denied to the enemy or because the enemy must be made to retreat from them.*  
40

Now, the air base had to be denied to the enemy. But if the enemy got onto the air base, the specific role of the quick reaction force was to expel them.  
45 To either kill them or drive them off the base. So basically make them

retreat from the base if they couldn't be destroyed. That's the military objective. Defending the vital points was also a similar military objective.

5 Even in the Defence definition it's got – one of them is basically people who are armed and willing to use weapons. And that was the communist terrorists. There's no argument there, that they would be another military objective, at the tactical level, and we're talking about the tactical level here, the communist terrorists were a military objective. We were to deny the base to them, we were to counter attack and drive them off the base.

10

THE CHAIR: Mr Marsh.

15 MR MARSH: Chair, I'd like to say first, when I got out of the air force I was a sergeant engine fitter, I'm not exposed to this high level stuff. But I know from my studies in risk management they talk about strategic concept, strategic environment, organisational environment, and the specific risk management environment. And I see all this Butterworth within that context.

20 Unlike Diego Garcia, which was something in excess of 2000 nautical miles away from the enemy, where the only possible but improbable threat was that the Taliban would hijack an airliner and try to do a 9/11-style attack. And I fail to see in there how there could be any expectation of casualties and in all of that.

25

RCB at Air Base Butterworth were on the Malaysian mainland, Malaysia was fighting an internal communist insurgency war. And however we see Butterworth and RCB, it needs to be seen, in my view, in that larger context. Military and police installations were being attacked by the communists, they had demonstrated an ability that they could attack, they had demonstrated intent that they could attack. When I look at the documentation from the time, the documentation says, "We can't say that Butterworth or Australian assets will be singled out for attack, but neither can we say that they will be" – you know, they couldn't discriminate.

30

35 Any attack on that air base was an attack on the air base. Malaysian, Australian personnel on that air base would all be subject to that attack. That's what is said in the documents, and we've spelt some of that out in our submissions.

40

There is actually a comment – 1975, I can drag it out, but it's similar submission, I think, that, you know, the enemy has the upper hand. They're mobile, they can move among the civil contribution, they can basically spring out of the jungle, throw a couple of bombs over the fence and run

back in. To ignore that threat is to risk political embarrassment and military ignominy.

5 In that context, if we look at it in terms of the environment in which Air Base Butterworth is operating, there were not only expectations of casualties, casualties had occurred. Not at Butterworth per se, but in the area around Butterworth and in downtown, in the middle of Kuala Lumpur a senior police officer was gunned down by terrorists. The Ipoh police commissioner was gunned down in the middle of Ipoh. There were attack  
10 on the field force headquarters in KL. That was in KL itself.

There had been rocket attacks on a military installation on Penang, which was the old Minden Barracks, there had been attacks in Sui Petani and all of that sort of stuff.

15 So when you look at what was going on around, casualties had occurred, attacks had occurred, and this was the environment in which we were operating. So to say – to try and say, “Oh, well if we’re just looking at RCB,” I believe that we must look at RCB in that broader context. Because  
20 we were – the RCB was simply one sub-element at Butterworth. The air force was a sub-element of Butterworth, because they also had the RMAF there.

The RMAF were flying operational sorties against the enemy, which was considered a factor which increased the likelihood of attack against Butterworth. Everything these guys say I believe ignores that context. If you look at what Clarke and Mohr and others say, it has to be the facts as they were known at the time, not what the historian said. The facts at the time. The facts at the time, there was an expectation of threat, there were  
25 communists running around, there was identified enemy and these guys – and there’s a document from 1974, up until March 1974, the RCB, although I don’t think they called it RCB then, thought that their main role was something. But from 1974 on they’ve understood that their prime role is security and the defence of the air base.

30  
35 So I’ve said part of what I want to say, I might say more later.

THE CHAIR: Mr Kelly.

40 MR KELLY: I’ll be very brief, Chair, just to add to what the other people have said. That is sort of in the pursuit of military objectives, we’ve heard that the quick reaction force carried first line ammunition, which was typically for an infantry soldier carrying an SLR, three magazines of 20 rounds each magazine, an M60, I know I used to carry 200 rounds on a belt  
45 on M60 when I was carrying one of those. But the effect of the QRF was

just to hold a penetration until the rest of RCB could be activated to support them.

5 But it's worthwhile noting that the QRF carried two first line loads of ammunition. Troops that went into the field in Vietnam didn't. They were going quite a distance from their resupply. The QRF was gunned up, just to use a term, because the expectation was that if they had to use the live rounds that they carried, they'd be using a lot of them, and the evidence supports that. I don't know what anyone could say to refute the fact that  
10 why were we carrying two first line loads? That's it.

THE CHAIR: Okay. So you've heard the discussion earlier about non-warlike. You've heard our view, the fact there was a risk associated with assigned tasks. And there can be argument about the words used to  
15 rate that risk, whether it was low and unlikely and so on and so forth, and as I said yesterday, we need to be and we will be very careful in our analysis and in writing to make sure that we don't use inappropriate words, that we correctly represent the historical documents, that we are not selective or inaccurate.

20 But I think it's true, and you tell me if it's not, that nowhere in the documentation was the risk rated as medium or high. Did you ever find those words?

25 MR FULCHER: Those words are not in the documents.

THE CHAIR: No.

30 MR FULCHER: There is no - - -

MR KELLY: I was going to say, Chair, that the Deputy DMI, Malaysian Deputy DMI suggested in an exchange with the Defence Attaché in Kuala Lumpur that the attack was probable.

35 THE CHAIR: Yes.

MR KELLY: But I think he used words stronger than that, I'm not - - -

40 THE CHAIR: Well, we'll look for that and we'll certainly take it into account. But at the end of the day, it seems that that did not convert to an Australian risk assessment of medium or high.

45 MR KELLY: Except that he was quoted widely, and I can provide the references to that – I'm pretty sure I have, but I'll certainly separate them out and send them to you.



THE CHAIR: Please.

5 LIEUTENANT COLONEL MICKELBERG: Nor did it equate to any reference of low. In fact, there's no mention of the level of threat in the documents that are available to us, including the JIO assessment. It doesn't say it's low, medium or high.

10 AIR COMMODORE GRADY: That's true of the JIO ones. There are other intelligence documents though.

LIEUTENANT COLONEL MICKELBERG: There are.

15 AIR COMMODORE GRADY: That do refer to low. And I'm specifically referring - - -

20 LIEUTENANT COLONEL MICKELBERG: And there are a range of documents that I've prepared a brief on for you that reflect a level of concern at the strategic level, cascading, briefed to the prime minister and others, that indicate a level of concern about the threat to the base, that suggest to me, or to us, that there was strategic concern and also at the operational level, by the joint chiefs.

25 THE CHAIR: Concern, though I don't think, in terms of the wording of the definition, gets you there.

30 LIEUTENANT COLONEL MICKELBERG: No, but it relates to duty of care, which still existed then. They had a duty of care to protect Australian service personnel and dependents and property.

35 THE CHAIR: I'm not quibbling with that. But you can have a low, improbable, likely, unlikely risk that – to which the duty of care applies and you need to do certain preventative or avoidance measures, but that doesn't mean you're up in the warlike.

LIEUTENANT COLONEL MICKELBERG: No, it doesn't. And I think the point you've made earlier is that it doesn't really matter what the level of threat was, the fact is it was assessed there was a threat.

40 THE CHAIR: Yes, that's what the definition of non-warlike says.

LIEUTENANT COLONEL MICKELBERG: And in the context – yes, agree.

THE CHAIR: Now, then the definition of warlike doesn't talk about the level of risk, but it says there's – those military activities where the application of force is authorised to pursue military objectives, and we've had a discussion about what that means, and there is an expectation of casualties. Now, the expectation I think is to be contrasted with the possibility – I'll get to you, Mr Marsh, don't worry. Those definitions imply some sort of graduation, and an expectation of casualties beyond the possibility surely starts to emerge the higher the risk.

10 The greater the chance of an attack, the more likelihood of casualties. And at some point you get to some level of risk, you get to a point where you're not only saying it's possible that we might have casualties, you're saying we expect casualties.

15 LIEUTENANT COLONEL MICKELBERG: Also I think you have to take into account the types of weapons that might be used by your adversary. So for example, JIO have clearly indicated the potential for indirect attacks.

THE CHAIR: Yes.

20 LIEUTENANT COLONEL MICKELBERG: That involve weapons that necessarily don't provide a degree of discrimination as to who's going to get hit.

25 THE CHAIR: Sure, I accept that.

LIEUTENANT COLONEL MICKELBERG: That was alluded to by Lieutenant Colonel Michelson and Charlesworth yesterday.

30 THE CHAIR: I understand that. If there had been an attack using mortars are other similarly indiscriminate weapons, the risk of casualties or the likelihood of casualties would rise and you might get to expectation level. But you can't just say they might have a mortar, therefore it's warlike. The question is what's the risk of them using a mortar against the base.

35 LIEUTENANT COLONEL MICKELBERG: So that's why we did that assessment that you asked us to do, so you asked us to provide an assessment, a contemporary assessment of the expectation of casualties. And because there was no methodology then for doing that, we opted to use the methodology that is extant in ADF doctrine, that we've already talked about, and produced that assessment based on risk, which is based on the international standard for risk management, which Defence is a signatory to.

THE CHAIR: Yes. And we appreciate the work that you did and, rest assured, we'll have regard to that. I'm really now not so much asking you to start from scratch, but asking you if there's more that you want to say than you have already said, having heard what Defence has said about warlike, having heard the questioning between us and Defence about warlike. Because that's where you want to get to. When you look at the definitions, the key things are authorised to pursue military objectives and an expectation of casualties. So it's something beyond non-warlike. Something beyond risk, and it's something beyond the possibility of casualties.

MR KELLY: Chief, you've mentioned the gradation in the New Zealand system. Isn't it fair to say that the Australian recognition of the escalation of risk was reflected in the construction of revetments? In the occasional putting of medium machine guns on likely approaches which we've seen in the photographic evidence of the up-skilling, if you like, in the genesis of RCB.

In my time we didn't have this Tobias ground sensitive equipment, it wasn't around in those days. We didn't have search lights on in trucks. We didn't have a lot of things because things were different. Although my time was a particularly hot period, was the fall of Cambodia and Vietnam and those kind of things. So we have seen within the ebb and flow of things that happened in the 21 years.

We have seen that the defence of the base has been more sophisticated or been more in depth and I think that's a reflection of the fact that the expectation of not only damage that can be inflicted by indiscriminate area weapons like rockets and mortars but also the fact it's likely to be perpetrated. Defence doesn't throw money around like that. You know, what things are like.

THE CHAIR: If I could, sorry - I will come to you, I will come to the gentleman at the back in a minute. I just want to tease out what you were saying there, Mr Kelly. I mean, I think it's clear that there were improvements made to base security; the revetments were built; there were shelters built for aircraft; there were sandbags put around to avoid lying in mortar because of the high water table; and so on and so forth. They were preventative or avoidance measures to limit the damage if there was an attack.

MR KELLY: Some temporary - - -

THE CHAIR: But I don't - but does that mean that the risk of an attack was higher, was there a change in the assessment of risk, and did it get to

the point of being not only are casualties possible but we expect them?  
And I think, correct me if I'm wrong, there's no document that says we  
expect casualties. If we're going to make a view about that we've got to  
infer it from things, there's nothing express. And there might be all sorts  
5 of good reasons for that.

MR KELLY: So there is a document in the Air Defence Plan, appendix 4  
to annex B, "Coordination to the Medical Plan". This is a direction from  
10 the base commander to the CO of 4 RAAF Hospital.

*Will implement a satisfactory medical plan within the restrictions  
imposed by curfews, et cetera. He will prepare in advance a broad  
medical plan to meet shared Defence situations.*

15 So this in the context of the mission that's stated right up front in the  
shared Defence Plan, that is the mission is to protect the base.

THE CHAIR: Yes, but - - -

20 MR KELLY: When you look at what you're addressing what we need to  
do is we need to, as has been identified, identify what is the military  
objective, so we have one, it's implicit, it's in the mission. And then we  
have measures that support the mission. Those measures are tasks in the  
case of context of RCB. Then we have orders in relation to the use of  
25 force to protect people, property and personnel, which is stated in the  
mission, in the objective. And then of course we have other measures to  
deal with dealing with casualties that obviously the base commander  
perceived are likely to occur in the event of an attack, whether it be direct  
or indirect.

30 THE CHAIR: So just on that, and let me say, I'm playing devil's advocate  
here.

MR KELLY: I understand that.  
35

THE CHAIR: I'm not trying to signal any concluded view because  
seriously we don't have one yet, it's the purpose of these hearings. But  
playing devil's advocate I want to give you the opportunity to contemplate  
the alternative. Now, when you talk about having the medical plan and  
40 the facilities that's something I think a wise person would do where there  
was a recognised possibility of casualties. It doesn't necessarily mean  
there's an expectation. That's the difficulty that we confront. There's a  
whole lot of things that are consistent with possibility but is it a possibility  
that is of such high likelihood to reach the expectation level?

45

MR FULCHER: If I may? The JIO makes it clear, I think, and there's other evidence that makes it clear, that it wasn't just that maybe they have got mortars but it was discovered that they did have mortars. But not only mortars, rockets, and they'd use rockets against other bases. And the JIO report says that that form of attack, rocket or mortar attack, on Butterworth was quite likely.

If an attack of that type was quite likely you'd have to expect casualties. But I think that this might be useful in going to the 2018 which sort of clarifies some of this. And the 2018 definition says:

*ADF personnel are authorised to use force to pursue specific military objectives and there is an expectation of ADF casualties as a result.*

My argument would be that as for the case of Butterworth there is an enemy and you've stood up somebody against that enemy you've got to expect casualties. You can't say, "Oh, but the enemy might not fire mortars at us", or, "Oh, the enemy is not that aggressive", if you're standing up people to meet a threat and you know the enemy are armed you know they have attacked bases you cannot say you do not expect casualties. It's just an impossibility.

Now, you can have your threat assessments and all that, and I mean, and the threat assessments, like I said, they said the mortar attack is quite likely and other forms of attack were less likely or unlikely. But definitely there's a whole range of different adjectives, if you like, from probable to possible, to likely, to quite likely. And that's why we've done the threat assessment. You're right, it's not - the risk assessment, sorry. It's not listed in there that this was a medium level of threat, this is a high level of threat, we make that assessment based on the evidence. But like I said, if you're standing two people up to have a fight you can't expect that they're not going to hurt each other.

THE CHAIR: Yes, but the question is are we standing two people up to have a fight. That implies a level of probability that there's going to be a fight. If the risk is rated lower, you know, I could walk down the street and that fellow might attack me with the pick handle that he's holding, that doesn't mean he's going to. And when you talk about the 2018 definition let me just remind you that it says not only capability, it says:

*An identified intent to directly target ADF personnel.*

MR FULCHER: Yes.

THE CHAIR: So you've got to have if that definition were applicable, and it seems it's not but we can have a look at it, you've got to have an identified target, an identified intent to target the RAAF at RCB.

5 LIEUTENANT COLONEL MICKELBERG: So I would draw a parallel with when we moved to the ranges, as Charles Worth alluded to yesterday and I've mentioned, there had been attacks on Malaysian Security Forces on road conveyes. Fatalities had been inflicted.

10 THE CHAIR: Yes.

LIEUTENANT COLONEL MICKELBERG: Putting aside whatever their level of expertise was to deal with that, I as a commander had a command responsibility to be prepared for the likelihood of attack and as a  
15 consequence, casualties. Therefore I had measures in place to deal with that. So to rig the trucks for a counter ambush, we had our medics positioned where they could and we had follow-up casualty evacuation procedures in place.

20 The base hospital had been warned out that we would be moving and that there might be the potential for casualties. That was a command responsibility that all commanders have whether they're navy, army, or air force. And you cannot do that without considering the threat, the nature of your tasks, and what you're doing on the day.

25 THE CHAIR: Yes, and look, they were all good and wise precautions, says me without any military experience, but they sound to me to be that something that a wise person would do. But you do wise things where you've got a possibility not only when you've got an expectation. When  
30 we look at that 2018 definition and it talks about identified intent to directly target Australians.

So the evidence yesterday was that the CTs had been ambushing  
35 Malaysian Forces but the evidence was also that Australian troops drove through the same area at the same time and were not targeted. And that may well have been, who knows, it's pure speculation, a conscious decision by the CTs that they didn't want to attack Australia, Australian Forces, and bring Australia into a domestic conflict because that would greatly enhance the military capability that they were trying to fight. So,  
40 you know, it's speculative, I accept that, but the mere fact that you do smart things, good things, preventative things, doesn't mean you suddenly get to an expectation. You might have been overcautious, I don't know.

So before we go, gentlemen, there's a gentleman up the back who has been putting his hand up for a long time and I'd like to give him the opportunity.

5 MR CHITHAM: Thank you, very much. My name is Ted Chitham, I'm with the RCB Review Group and I've done a lot of this research. I was a lieutenant colonel in the army or in Vietnam as a company major. And I was the CO of 8/9 RAR who sent three rifle companies to Butterworth during my time as the CO in '75 and '76. What you were talking about  
10 history before, just remember these aspects of history; 1967 Britain said they're withdrawing from the Far East.

At Butterworth at that time the RAAF had the RAF Regiment, which is an infantry trained force, to protect the base. That concluded on 31 March  
15 1970. Transfer of ownership to the base went to the Malaysians but the Australians were responsible for the defence and then with the joint defence. The date 1 April is very important because then on 6 April Air Commodore Parker suggested - or didn't suggest, reported, to the High Commissioner that he believed that the Malaysians were not capable of  
20 protecting the base.

So the base hadn't got what amounted to a company of the RAAF, the RAF Regiment, so the base was not protected, the air commodore said, "We're at risk". What happened thereafter a company from 28 Brigade  
25 went forward to protect the base in November and then you know the rest that went on. So there must have been a risk for the Australian Government to say we need to be there even after the Australian had withdrawn from Singapore in 1973.

30 That's that one, the history. The second one is the threat. Now the importance of the threat is this, that prior to 1972 China actually supported the Malaysian Communist Party. In '72 was the rapprochement of the Americans with China. China withdrew its support from the Malaysian Communist Party. The North Vietnamese took over. What happened in  
35 1974, and of the war in Vietnam, the Viet Minh had won. From there on there was great support given to the Malay Communist Party from the Viet Cong or the Viet Minh.

40 Now, have a look at the casualties that occurred to the Malaysian forces from that date on, and you'll see the peak of casualties to the Malaysian. 1975 - 1976. So the threat was there. The support was given to the - their CTs and they had the capability and the capacity. That's all I wanted to say.

45 THE CHAIR: Thank you, sir. And that - they are all facts of which I believe we were aware, but it is important that we keep them in mind. But

in that respect, there was undoubtedly a very high combat situation between the communist terrorists, whoever they were supported by, and the Malaysian military, and there were severe casualties amongst the Malaysians, but that was because there was internal insurrection, seeking to overthrow the Malaysian Government. Australia wasn't party to that combat, and the threat assessments I have no doubt took that into account, and still came out with an assessment that wasn't medium or high. You can argue about low and unlikely and so on and so forth. We'll go through all that very, very carefully. But I don't think that history, important to recognise and remember, actually leads you to a determination of warlike service for the Australian RCB.

There was – if we were talking about, “were the Malaysian troops operating out of Butterworth in a warlike engagement”, may well say “yes”. But - - -

UNIDENTIFIED SPEAKER: But they were.

THE CHAIR: Yes.

MR CHITHAM: The thing – but the thing about it is, the broad operational base for the Malaysians against the CTs in the northern area was Butterworth. They went – they were actually deployed in helicopters to the operational areas. But casualties came back.

THE CHAIR: Yes.

MR CHITHAM: Yet the Malaysian Air Force, by being there, was a target. It was proven in 1973 I think – and Ken might be able to confirm this – with the attack on the RAAF airbase down near Kuala Lumpur. So they had the facilities. It was a prime target. Not more than 60 kilometres from the Malaysia-Thailand border, which was the base of the CTs.

THE CHAIR: Yes.

MR CHITHAM: So the capacity was there. The capability was there because they had received from the military North Vietnamese the rockets, the mortars, the mines. And we're talking about wave lines, which were used, and as were the booby traps. And the North Vietnamese were providing information and technical and training support to them. Now, all you've got to do is look at Chin Peng's book and have a read of that and see what sort of support was being given prior to, you know, at the end of the Vietnam war. And in fact, the Chinese threw Chin Peng out of China, and Chin Peng re-established his support – and we're talking about propaganda and, you know, that sort of support – from North Vietnam.

45



THE CHAIR: Yes.

5 MR CHITHAM: So to try to say that the CTs, you know, didn't have the capacity or didn't have the armament to do it – and here was the – here was – you know, RAAF Base Butterworth with a major component of the Malaysian Air Force that was the broad operational base for deployments into the combat areas.

10 THE CHAIR: Look, I don't disagree with any of that. As far as I know, that's a fair statement of fact. But the other statement of fact is that those things were known at the time, they were taken into account by JIO and others, and all the documentation about risk of attack, likelihood of attack, whatever term you want to use, didn't rate the risk at medium or high. It was at the bottom end of the scale.

15 UNIDENTIFIED SPEAKER: It did say there was a risk.

THE CHAIR: Hey?

20 UNIDENTIFIED SPEAKER: It did say (indistinct words.)

THE CHAIR: Yes, it said there was a risk. Yes. Yes. No question. That's the discussion we had earlier.

25 MR KELLY: Yes.

THE CHAIR: Now, let's – let's - - -

MR KELLY: Sorry.

30 THE CHAIR: I think - - -

MR MARSH: Mr Chair, I've been waiting - - -

35 THE CHAIR: I think Mr Marsh has been waiting a while. Yes.

MR MARSH: Mr Chair, I refer you to a bundle of documents provided by Defence on 16 December last year. Now, that includes minutes of a Cabinet meeting held to discuss the Moore Report, and it also includes a copy of a report done prior to the Moore Report by Defence. Now, in those they talk about the importance of the CEDA principles, including equal recognition of service.

45 THE CHAIR: Yes.

MR MARSH: For like service. They talk about objective criteria. And in that 1997 – '98 report – whatever it was – I have my notes but I can never find them - - -

5 THE CHAIR: You're not alone in that.

MR MARSH: - - - the 1996-7 review – '97 review – and I'm not quite clear of the date but it's in the bundle of stuff.

10 THE CHAIR: Yes. I vaguely recollect it.

MR MARSH: It clearly states that the two elements referred to in the Veterans' Entitlement Act 1986, as operational service and qualifying service in essence, have not changed, regardless of legislation changes over the years. Then it says, "Veterans on operational service who have incurred danger from hostile forces of the enemy remain entitled to receive service pension". And in that context I believe it's important to go back and look at what Moore and Clarke said about incurred danger. I fully take your point about the incurred danger, and the Veterans' Entitlement Act which talks about warlike and non-warlike service, and that's the only avenue we have.

But Moore, for example, said that section 7(a) of the Veterans' Entitlement Act requires in essence veterans to have incurred danger from hostile forces, and I believe that that is consistent with this warlike definition that we're looking at. Now, Moore in essence said – and Clarke agreed with him – that (a) if there's an enemy shown to be present, the forces have incurred danger (b) if the forces are shown – are told that there is an enemy presence. It comes down to warnings. And so they make a lot about warnings, given the time information given at the time and whatever.

When we talk about low, medium, high, all that sort of stuff, Clarke in particular makes a lot of comment about how irrelevant that is, because once the enemy – once the danger is established, that's established, and not the further qualification by imminent or whatever. And let's face it, a lot of these assessments are subjective assessments. You know, to say it is unlikely or it is likely or there is definitely a threat that this will happen, that remains a subjective assessment. It is not objective. But the qualification is an objective test. Not a subjective test.

So we can argue about whether there was a high degree of probability, a low degree of probability, or whatever. All that is subjective. Because we cannot know – and this is what they go to a great deal to point – to point out. We know the enemy's in the area, they make reference to the (indistinct). Once the (indistinct) have been in the Indian Ocean, no-one

5 knew whether there were any other enemy cruisers there or not, but they were sending people into harm's way, because you couldn't rule out that probability, and that's where I believe this is relevant to Butterworth, in that no-one knew where or when the enemy would strike next. They knew the enemy would strike next, but they did not know where or when. So if you look at what Moore Clarke say – and I think even if you look through the stuff of Toppem – Topperwein, Toppermein or something.

10 MR CHAIN: Topperwein.

MR MARSH: Topperwein, yes. I think he says similar stuff.

15 MR THE CHAIR: Bear in mind, Topperwein is what I might call a learned dissertation.

MR MARSH: Yes.

20 MR THE CHAIR: About the evolution of repatriation law. And for the record, let me say that I know Bruce Topperwein very well.

MR MARSH: Yes.

25 MR THE CHAIR: He worked for me when I was the principal member of the Veterans' Review Board, and he's a very smart guy, and he's a very good historian on these matters. But he doesn't talk about RCB service.

MR MARSH: No, he doesn't.

30 MR THE CHAIR: The - - -

MR MARSH: But what I'm trying to say is that you look at – I think it's chapter 13 of Clarke - - -

35 MR THE CHAIR: Yes.

MR MARSH: - - - and he also talks about the development of the repatriation system.

40 MR THE CHAIR: Sure. He does.

45 MR MARSH: And about how, in the leadup to 1993-94 it was basically a bidding competition. No-one knew what they were going to get until they come back. So they brought in this to bring about equity and fairness to all veterans, whether they had served before 1994 or after 1994.

MR THE CHAIR: Yes.

5 MR MARSH: And therefore, I believe that those – those same principles apply, and if they are – our aim is to require equity and fairness to all, which is consistent with the CEDA principle, then the presence of an enemy and the warnings given – remembering this is before they had this warlike definition – I think they should be given serious consideration.

10 THE CHAIR: Moore and Clarke are quite different in their approach. Moore applies some convoluted or concocted “incurred danger” test.

MR MARSH: Yes.

15 THE CHAIR: And the government’s view – and I think the correct view – is that that test was misstated. So the government took decisions on Moore recommendations according to the ’93 definitions. It recognised that they weren’t enforced at the time, but it said that modern criteria were appropriate to be used. Clarke was aware of the ’93 definitions and I think by and large sought to apply them to each of the services – service operations that he discussed.

20

MR MARSH: Yes.

25 THE CHAIR: And of course, let’s not forget that he said RCB service was neither warlike nor non-warlike. Now, you’ve heard me say that we think his reasoning - - -

MR MARSH: Yes. Yes. No.

30 THE CHAIR: - - - doesn’t substantiate that conclusion. But a lot of what you said hinges on actually being exposed to danger, having faced the enemy, and that didn’t happen at RCB. There was a risk that it could happen. And thank goodness it didn’t happen. There’s a lot of documentation about the seriousness of that risk, but – and that in our view clearly gets you to at least meeting the non-warlike definition. But does it get you up to the warlike definition, where the – it’s obviously got to be more significant than non-warlike – I’ll get to it – and – I’m just worried about people getting tennis elbow – the assessment at the time which, I mean, I don’t think any of us are in a position to deny says “no”. So, you know, we – I’ve read all those documents, I understand them, and I remain to be convinced that that’s going to get you where you want to go.

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MR MARSH: No. I was just going to say that Clarke and Topperwein - - -

45 THE CHAIR: Topperwein.

MR MARSH: - - - Topperwein, they make comments about the non-realisation of a risk does not rule out the reality of that risk, or that threat.

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THE CHAIR: Yes, and that I think is correct because the definitions are prospective.

MR MARSH: Yes.

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THE CHAIR: They're about risk, and this is the discussion we had with Defence earlier about the fact that it didn't happen.

MR MARSH: Yes.

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THE CHAIR: That doesn't mean that it didn't meet the definition.

MR MARSH: Yes.

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THE CHAIR: Again, it comes down to the assessment of the magnitude of the risk likely, or whichever word you want to use and I know you have a background in risk assessment.

MR MARSH: Yes.

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THE CHAIR: Yes, using modern terminology.

MR MARSH: Yes.

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THE CHAIR: I'm not wanting you to expect me to use modern terminology precisely correct, but I think you can see where I'm going. Now, Mr Kelly, you wanted to say something?

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MR KELLY: Thank you, Chair. I'm going to take you back to an analogy you used a little while ago but before that, the geopolitical context at the time that RCB was established was when the Australian Government had moved from a forward defence posture to fortress Australia, which is the Whitlam Government basically change. So, they were draining money from Defence as quickly as they could to fund other initiatives and whatever. I'm not here to argue that.

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But you made the analogy a little while ago about if someone's in the street with a baseball bat and you are walking down the street, is there a likelihood or a risk that they might hit you with the baseball bat. That's fair enough if you happened to be there. We were sent specifically to respond to that

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threat. If a policeman was sent as a result of a phone call saying there's someone here with a baseball bat, they would expect I imagine to get involved with that person.

5 We weren't there by accident. A lot of money was spent. A lot of time was spent. We were sent there specifically because the realisation was established that the Malays didn't have the capacity to do it. At one time there was a discussion about whether two battalions might be the correct force necessary to defend Butterworth.

10 Now, of course that would, I think anyway, be dependent upon whether there was going to be aggressive patrolling outside the boundary like allegedly took place at Ubon where the airfield defence guards patrolled up to 20 kilometres away from the perimeter, while the Americans sat inside the perimeter and performed basically like what RCB did. So, we were  
15 deliberately sent there to be put in between basically the air base and the belligerents, be they communist terrorists or whatever.

20 So, I think it's reasonable to not use the analogy of you just happened to be walking down the street and someone is there with a baseball bat.

THE CHAIR: Let me say, analogies are seldom very good.

25 MR KELLY: Yes, I know, I understand that. I wasn't taking you to task.

THE CHAIR: Let me also say, my father was an ironmonger. I grew up in a hardware store. We sold pick handles. I never once felt at risk from someone who purchased a pick handle and was going to attack me. So, it all comes back to the assessment of risk.

30 MR KELLY: Yes.

THE CHAIR: The assessment of risk for RCB service on the historic documents is at the lower end of the scale.

35 MR KELLY: Yes.

40 THE CHAIR: Yes, you were sent there in case there was an attack and had there been an attack, you would have had an absolutely vital role, no question, but what was the level of risk.

MR KELLY: Yes, but with the benefit of hindsight, with the benefit of hindsight you can say that.

5 THE CHAIR: No, no, I'm saying it by reference to the contemporary documents written at the time. I'm not saying that it wasn't warlike service because you didn't get attacked. You've heard us saying to Defence we think that's not relevant when applying the definition. We're not saying it wasn't warlike because you weren't attacked.

MR KELLY: Yes.

10 THE CHAIR: The question is was it warlike when the contemporaneous assessment was that the risk was down here and not up there.

MR KELLY: The qualifiers of risk I think have been in some cases misrepresented, because as we said and as the air commodore said, nowhere in the JIO documents does it say it was light.

15 THE CHAIR: No. But we will go through every bit of contemporaneous assessment that we can find and I think we've located most and thank you, colonel. We will trawl through that very, very carefully, as I said yesterday. But my recollection on reading what I've read to day and I'll go through it all again and I'm sure my colleagues will, is here, not here.

20 MR KELLY: Qualifiers are dangerous. As you know, you can't be a little bit dead or a little bit pregnant. You either are or you aren't. But also, as we heard from the two group captains, and we're talking about what's happened on the ground versus what maybe – we talked about the fact that the risk had to be perceived by an Australian intelligence agency – that's somewhere in the requirements – yet the base was responding to input from Malaysian intelligence as well and decisions were being made. The GDOC was being activated and all sorts of things that fed into what RCB did, what preparations were taken, what postures were assumed, not from Australian intelligence agencies necessarily.

25 You could almost say, and this is an analogy and I bear the risk of what I am going to say, the Australian intelligence agencies threat assessment seemed to be more strategic, where the Malaysian input, because it was responding to what was happening on a daily basis, was more tactical. But the air base, because by virtue of its very existence, the officer commanding had to respond to the daily threat. Then the posture RCB adopted was relevant to that daily threat and not necessarily the strategic threat, which we haven't seen very many examples of JIO assessments or other Australian intelligence agency assessments over the period.

30 35 40 THE CHAIR: Yes. Well, again, playing devil's advocate, I accept entirely that the base commander had to have regard to what the Malaysians were saying to him and he did do so. We had evidence yesterday that that got

fed back to Canberra and it didn't result in a change of risk assessment and when the base commander did react to what he had, he went to orange – is it orange?

5 VARIOUS SPEAKERS: Amber.

THE CHAIR: Amber, sorry, and not to red. So, he took it into account

MR KELLY: Sure.

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THE CHAIR: But he didn't get up to "Goodness gracious, an attack is imminent. It's going to happen".

MR KELLY: Sure, but within his obligation and responsibilities, he responded. It could well be, and we don't know, that when it got back to Australia, they're saying, "It'll be off tomorrow because it's the ebb and flow and what happened". I might also say one other thing. Yesterday I gave evidence that we drove through what was perceived to be an ambush site. We don't know for certain whether the CTs were actually on the ground when we drove through, but they could have been on the way. We don't know.

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THE CHAIR: No, there's a lot of speculation.

25 MR KELLY: Yes.

THE CHAIR: It's the sort of thing you'll never know. Now, the gentleman at the back, did you want to say something?

30 UNIDENTIFIED SPEAKER: Mr Chairman, thank you very much for the opportunity to talk with this (indistinct). There is a 1971 Australian High Commission document about security at Air Base Butterworth, authored by the Defence Attaché and his assistant, and this is a direct quote:

35 *He assessed Air Base Butterworth as a probable target, based on his assessment of recent increases in enemy (indistinct) activity in the area.*

40 That is a statement by the Deputy Director of Malaysian Intelligence of the Malaysian Army. He was talking about a probable, not a possible target, a probable target.

THE CHAIR: Yes, we're aware of that document, yes.



UNIDENTIFIED SPEAKER: I want to suggest, as the air commodore said yesterday, there are gaps in the file. There are gaps in the documents. There is no question about that.

5 THE CHAIR: Yes.

UNIDENTIFIED SPEAKER: That, by itself, should not work in the negative in this situation in any way, shape or form. Also, could I suggest to you that the JIO assessment in Annex E recounts by date and by location approximately 132 separate incidents of communist terrorist sightings or actions in the vicinity of Air Base Butterworth. That is just in one purview and one period that had been taken. He even said before he left - we have provided to the Tribunal a tabulated data of Malaysian casualties through the second emergency. I think you for quite reasonably link the threat there. He would also go on to the JIO assessment and the JIO assessment quite clearly talks about the indiscriminate nature of potential casualties, based on an attack at Butterworth.

20 *It is unlikely that the CTO would try to discriminate between RAAF and RMAF targets and Australian personnel would be in clear danger.*

25 That is his statement straight out of the JIO assessment. So, could I humbly suggest that, (a) there was a clear threat, and (b) there was a clear risk to the members of Rifle Company Butterworth. If there is a lack of other evidence in the chain of reporting, that certainly should not work as a detriment to the applicants. It was in fact the record keeping at the time. Thank you, sir.

30 THE CHAIR: Thank you, sir. I do recollect that diplomatic cable and rest assured we will take that into account and we will be trawling through all those documents.

MR KELLY: Could I (indistinct words), Chair.

35 THE CHAIR: Yes.

MR KELLY: I think that indeed in my document about half an hour ago.

40 THE CHAIR: Okay, excellent.

UNIDENTIFIED SPEAKER: Can I just say something, Mr Chair, just in relation to that and I acknowledge that but equally with no argument of (inaudible words), that is evidence to consider.

MR MARSH: Can I just say that I don't think we can divorce the threat or even the threat levels that were discussed in the JIO report because they do say that indirect is quite likely. I don't think they can be dismissed as being a low threat. I'm not having a go at you. I don't think we can also disregard the fact that the Malaysian base at Butterworth defensively was a joint responsibility. We were cojoined with the Malaysians and the Malaysians were engaged in, as you said, a very severe conflict. There were many casualties.

10 So, to try and separate out RCB or to try and separate out the base and say the threat to the base wasn't as great as perhaps the threat around the rest of the country, it was all part of the same conflict. I think that you have to look at that. That is a very important point, that it was cojoined. We were involved in the Malaysian war. We were defending their primary base that they engaged in these operations from. The fact that we were successful, the fact that we deterred the attack on the base should not be held against us.

20 THE CHAIR: Okay.

MR KELLY: That's another analogy and I know you're (inaudible words), Chair, but you have to look at Ubon. The Americans occupied Ubon. They provided the internal security for the base. We, as air force people – I wasn't one but they were – provided the external air base and a couple of aircraft on the runway.

30 The argument has always been in the material that I've read that, "Gee whiz, those guys should have been awarded warlike service because the Americans were engaged in the Vietnam War and therefore were on a war footing".

THE CHAIR: Okay.

35 MR KELLY: Eventually, of course, there was a reclassification.

THE CHAIR: All right. Now, look I think we'll break for lunch now. We can continue this when we come back but I think it's probably good that we all, (a) get some refreshment, and (b) think about and regroup.

40 Dr Robards, just before we do though, that question of substantially more dangerous. As far as I can find, the first times the word "substantially" appears in relation to hazardous service is in the minute from the secretary and the CDF to Minister Feeny, Parliamentary Secretary Feeny, I think it was, on 24 November 2011. It's either in the body of the minute or in the attachment to it. An example of where that phrase "substantially more

dangerous” gets elevated and put in quotes is a letter dated 4 December 2013 from The Honourable Darren Chester MP to a Professor Michael McDaniel, I think it is, so 4 December 2013, and it crops up in a number of other letters. They are letters that Mr Hill provided to us and I’m sure you’ll be able to readily find them.

DR ROBARDS: Sure, okay. Thanks.

THE CHAIR: Okay. Let’s break for half an hour.

BRIGADIER HOLMES: Just quickly, can you identify the parts of the agenda we’re going to talk to? Do you think you’re going to shut at 3?

THE CHAIR: Yes, I want to finish by 3 but I think we’ve had a fair bit of discussion certainly around about the 2003 - 1993 definitions. I’m only 20 years out of date, or ahead of myself. We’ve touched on the 2018 definitions but we’ve also noted that they’re not directly relevant. If we were having regard to them, I think it would only be I think confirmatory or to expand on the ’93. There’s been a lot of discussion over the last two days about rules of engagement and I’m not too sure whether we need to take those further.

BRIGADIER HOLMES: I know this question is on our document (inaudible words).

THE CHAIR: Yes. Look, I haven’t analysed that in detail but I didn’t throw up any questions in my mind. It was good, useful material. What we haven’t talked about is New Zealand and we do need to talk about that. We have talked about the 2001 paper and at this stage the last item that we had on our list for additional information really is a pretty limited list at this stage. There are things that we’ve asked before, things that the veterans have offered to give, and I think things that you’ve offered to give. I don’t know that I’ve got the running list of those but I don’t think there’s a great deal in it.

BRIGADIER HOLMES: Are you intending to go through all of the uncontested facts?

THE CHAIR: No. We’ll certainly ask the question about whether any of them are consistent only with peacetime, whether any of them are consistent only with wartime, but we’re not going to go fact by fact by fact. Life is too short for that. Okay, all right. Thank you, ladies and gentlemen. We’ll be back at 1.15.

## LUNCHEON ADJOURNMENT

### RESUMED

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THE CHAIR: Thanks for being back so promptly. I understand time's short. Just in terms of where we go from here, the panel have talked about it amongst ourselves, we think we've had as much discussion as necessary, some might say too much, about the Defence assessments against the '93 definitions.

We haven't had detailed discussion about the 2018 definitions, but I think we probably don't need to do that in any more detail, for a couple of reasons. The 2018 definitions are not applicable, they may be of some relevance to the issue of – and may provide a bit more insight of explanations. But I don't think we need to have more discussion.

I think we do need to talk about whether any of the uncontested assertions of fact are consistent only with warlike, non-warlike or peacetime. That is, is there any silver bullet in there. I don't think we need to talk any more about the meaning and implications of the rules of engagement or the threat levels at Butterworth.

WING COMMANDER PENNEY: Am I able to just add some facts that I'd like to present at this time? Perhaps as a follow on from this morning, before we get into that discussion?

THE CHAIR: Yes. Well, let me go through the agenda and then I'll certainly be happy to hear from you. We do need to talk about the New Zealand reassessment. The additional material that was provided by Defence yesterday, I haven't studied it in any detail, but I looked at it last night. I think it addressed the issues that we were wanting to have addressed. There's a couple that I think where it says "We're still thinking about that", and so I'd be grateful if we got whatever was foreshadowed there, but there was nothing in there that made me think I need to pursue that with Defence today.

We've talked about the 2001 paper in quite some detail. And the last item that we'd flagged was any additional information or hearings that might be needed. Now, as far as additional information is concerned, we've asked for some and that's been taken on board, for example, that's substantially. Veterans have offered some and it's either come or I'm sure will come, and I think that was all just historic documents. I don't think there was any sort of new creative talent work to be done.

LIEUTENANT COLONEL MICKELBERG: Can I just ask one question?

THE CHAIR: Yes.

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LIEUTENANT COLONEL MICKELBERG: I've been approached by a couple of veterans and asked are submissions closed?

THE CHAIR: No. Yes, look, I think we are very close, subject to getting what we've asked for, to having enough to get to a concluded view. What you've offered or what we've asked, we'd like to have by end April.

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LIEUTENANT COLONEL MICKELBERG: End of April.

THE CHAIR: If we haven't got it by end April, but we think it is absolutely essential to have it, we'll be back pounding on your door. I don't anticipate that. But, you know, a few more weeks I think for what you've flagged, hopefully submitted. And if submissions come in before end April, yes, we will read them. We're not in a position where we're going to bin anything.

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MR KELLY: Could you indulge my curiosity for a moment, please?

THE CHAIR: Yes.

MR KELLY: I've read through all the submissions to date, and I've yet to see one that's negative to our claim. Is that usual? Is that consistent with - -

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THE CHAIR: Apart from the Department of Defence submissions.

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MR KELLY: Yes, of course.

THE CHAIR: No, look, I think it's not unusual. I mean, you've been out beating bushes, I'm sure.

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MR KELLY: No, but I mean other claims, other hearings and inquiries.

THE CHAIR: Well, let me give you an example where we had about the same numerical number of submissions, which was the inquiry into recognition for death, wounding, injury or disease on service. They were almost entirely supportive of there being some additional recognition. There were, probably count them on one hand the numbers that opposed it. Having said that, there was not unanimity about what more should be done.

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MR KELLY: Yes, I understand.

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THE CHAIR: Would have made our life a lot easier if it had been. But yes, other inquiries, yes, it varies, but usually the people who are interested

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MR KELLY: Get involved.

THE CHAIR: Get involved. Somalia is a good example.

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MR MARSH: I wanted to make a comment before lunch, I'd still like to make that comment, but I'm prepared to wait for your indication of the afternoon, if you like.

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THE CHAIR: Yes, okay. Look, I've finished saying what I wanted to say about where we're going to go now. Is there any objection to doing it that way? No. Silence being considered?

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BRIGADIER HOLMES: I just note 30 April is only two working weeks of work, right.

THE CHAIR: Okay. If you need more, let Jay know.

BRIGADIER HOLMES: I just note you've got - - -

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THE CHAIR: We're not going to be mentioned, but we do want to bring it to an end.

BRIGADIER HOLMES: Thank you, Chair.

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THE CHAIR: Please make it stop.

BRIGADIER HOLMES: It's in your hands.

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THE CHAIR: Yes. Well, no, we're in your hands to some extent. Now, Mr Marsh, before you speak, the wing commander?

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WING COMMANDER PENNEY: Yes, thanks, Mr Chair. I'd just like to make a couple of comments that I think may bring more reality to the situation as it was back during Rifle Company Butterworth's time, and I'd like to point out that none of the intelligence that we gathered in country, in locality, we ever saw reflected within JIO estimates or assessments. And it beggars belief that the number of INTREPs that we sent back, and I know through my time and also Group Captain Coopes's time, and his was almost on a weekly occurrence, that none of those were reflected in anything that we saw come through to us from JIO.

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5 Now, our briefings in country that were offered by 6 Brigade and the police field force demonstrated to us and showed us that the CT had the capability, in terms of their weapon capabilities, they had the capacity because they were able to move around the country quite freely, as was evidenced by the number of incidents that we had.

10 I guess the missing element to there is intent. Now, if I step forward a bit, Air Base Butterworth at that time was being used as a mounting base to prosecute operations against the CT, using F-5 aircraft with high explosives, and also as a mounting base to deploy RMR troops using helicopters.

15 Now, given that, the air base was considered by the Royal Malay Regiment at that time, and it certainly was in our briefs, to be a legitimate CT target. I think that was highlighted and evidenced by the fact that whilst I was there they put a HANDAU company both with us and the other base that was prosecuting those types of operations at Buntar.

20 I think it was also consistent during Group Captain Coopes's time that they also improved the base defences, in terms of passive defence, with revetments and all the rest of that sort of thing. I think a lot of emphasis is being put in the wrong direction on how we believed, through military assessments, appreciations, TEWTs, in company with Rifle Company Butterworth about the way that CTs would prosecute an attack against Butterworth.

25 We never at any stage saw a massed attack or an attack in force. What we always saw and predicted would be an off base, direct fire or indirect fire weapon attack that would be used to cover a covert insertion through the base to attack vital points and key areas. Given that, and that was our assessment of how any attack would be prosecuted, the rules of engagement clearly covered and gave the wherewithal for Rifle Company Butterworth to either counterattack, counter-penetrate or stymie such incursions to the base.

35 So as far as I see it, and looking through the shared base defence plan, that I worked on nonstop for a couple of years, as did the group captain, the rules of engagement within that shared defence plan were clearly adequate to meet the threat. And as I said before, we had capability, we had capacity, and I guess the only thing left is intent. Well, if you tried prosecute, through history, we know that the easiest way to defeat airpower is to defeat the aircraft on the ground. The CTs did not have the air defence capability. The only way they could ever do it was to defeat those aircraft on the ground, and that's why Rifle Company Butterworth was there.

45

Can I add one final thing. When we rehearsed the base defence plan and looked at the assessment through military appreciation that we judged to be the threat to the base, we expected casualties. No doubt about that. If you assess that the type of attack against the base is going to be used by direct  
5 fire weapons from off base, and indirect fire from off base, you have to accept there's going to be collateral damage to both personnel and equipment. In that instance, 4 RAAF Hospital were trained and rehearsed and we expected casualties.

10 Sir, I'll leave it at that.

THE CHAIR: Thank you, wing commander. I appreciate you making those statements and we'll certainly have regard to them and the comments that are then made by yourself, the group captain and everybody else who was  
15 there are really valuable in putting things into perspective.

Now, Mr Marsh?

MR MARSH: Just to be brief. This goes back to Wain?  
20

THE CHAIR: Wine.

MR MARSH: Wine paper. And he is referencing to a case back in about 1942, I think. But he says:  
25

*The word that creates the most difficulty is danger, it cannot be considered without regard to the primary phrase "theatre of war". According to Websters Dictionary, the word "danger" may connote risk, jeopardy or peril, suggesting various degrees of  
30 danger.*

He goes on to say that:

*If therefore at any time when a man was serving, there is a real  
35 physical possibility of injury from enemy action and it was reasonably regarded as possibly imminent at any moment.*

And the assessment that the group captain referred to talked about small scale attacks at any time without warning, they were always potentially  
40 imminent.

That, in my position, is a situation covered by the word "danger".



*I am of the opinion that having proved a risk possible, the onus would not lie on the claimant to prove that a particular time the enemy was in a position to inflict injury.*

5 So the risk was in that sense probable.

*If in a particular area, say the Indian Ocean, it was proved that the Emden was destroyed, it would not be necessary to show that there were other raiders about. To put it another way, the claimant would not be defeated because the knowledge obtained locally showed that the enemy had no more raiders.*

Yes:

15 *I am therefore of the opinion the claimant is entitled to benefit section 37E –*

That must have been the Repatriation Act back then –

20 *If he can prove that he was on service in some place on sea or land where injury from hostile action was conceivable and might reasonably have been regarded as an existing risk. This is irrespective of proof to whether the enemy at that particular time was or was not capable of inflicting injury at the spot.*

25 And that's starts on page 9 and 10, and I know you have access to that document.

THE CHAIR: Yes.

30 MR MARSH: I would suggest that if we're talking about the sea, to the seat of principles of equitable service or recognition, I think that's an important point. Because that forms part of the precedent, the historical record of the development of repatriation benefits.

35 THE CHAIR: Yes, understood. But at the same time, I just have to note that top line was talking about provisions in legislation that do not apply in the present circumstances. He's talking about a different test, and that's an issue of some significance. The definitions that we're struggling with talk about there being a threat. Don't talk about people facing danger, don't talk about in the face of the enemy. Any of those other expressions. The repatriation law's got a long and chequered and highly convoluted history. What we've got to deal with is how it stands today, because what you seek is something that can only be done under today's law.

45

5 So let's attack those – attack may be a bad word – let's turn to those issues that I flagged. So veterans have put forward a lot of assertions of fact about what happened on RCB service, what the circumstances were, what the preconditions were, what you were told before you got there, what you were told when you got there, and so on, and Defence hasn't challenged those.

10 BRIGADIER HOLMES: Chair, just to be clear, our caveat has been that we accept that they are the experiences of the veterans, the stories that they have told.

15 THE CHAIR: Yes. And we've always said your failure or your decision not to contest them does not in any way imply that you support a conclusion that is sought to be drawn from them. That's the factual matrix against which we're doing. But the question - - -

20 BRIGADIER HOLMES: Failure is referred to. So you used the word "failure", failure to what?

25 THE CHAIR: To contest. Your decision not to contest. Failure is a bad word. Your decision not to contest, to require that - - -

30 BRIGADIER HOLMES: Thank you.

35 THE CHAIR: That we have evidence that you be able to cross-examination and so on. You're not challenging the assertions of fact, with the exception of those two examples, two instances, which I think are irrelevant. So the question is, in that whole spectrum of assertions of fact, does anyone say that there is anything in there that if it happened, would have happened only because it was warlike?

40 Now, let me give you an example. When I first read that the disciplinary process was while on warlike service, while on war service, I thought, well, there's a silver bullet. But when you research it, it's not a silver bullet. It just means there was a strange and inappropriate use of a term, the government described it as a misnomer, to make sure that there was a simpler, more expedited disciplinary process in overseas service. So that one looked like a silver bullet, but didn't bear scrutiny.

45 Has anyone got anything else that they think is a silver bullet? That could only, if this happened, it could only be because it was warlike.

LIEUTENANT COLONEL MICKELBERG: So Professor Stephens actually qualified that yesterday by explaining the rationale behind having them allocated whilst on service, war service, was to allow for charges to be preferred that weren't able to be preferred when on peacetime service

that were potentially more likely to occur when on warlike service. For example, he said desertion in the face of the enemy.

5 THE CHAIR: Desertion, yes. And he said that, but he didn't say it was to allow the prosecution of offences that could only happen in warlike service. And he said that – he wasn't that specific.

10 LIEUTENANT COLONEL MICKELBERG: I can certainly ask him to – in fact he sent me an email just last night and said, "If there's further qualification you require, please ask."

THE CHAIR: Well, if you want to send anything more, let us have it, and know that Defence will get it also.

15 LIEUTENANT COLONEL MICKELBERG: I understand.

THE CHAIR: We're being even-handed.

20 MR KELLY: Chair, there was a contention yesterday that "whilst on war service" is used on all service outside Australia. I've served in air force units outside Australia, I've served in navy units outside Australia, I've served in army units outside Australia, but only at Butterworth was the "whilst on war service", "whilst on active service" caveat applied to disciplinary issues.

25 THE CHAIR: And that may well be right, that it might have been applied inconsistently, but the fact that it applied at Butterworth, on the historical record, and the government's rationale, doesn't make it warlike.

30 MR KELLY: Maybe not, but troops were sent home from Butterworth for disciplinary reasons, same as the RAAF gentleman said, if we had a problem, we'd send them home. I mean, you wouldn't send the entire company home, of course, but there were situations that arose where individuals were repatriated to Australia for disciplinary reasons.

35 Whereas they could have been charged whilst in war service, whilst on active service, and suffered an increased penalty than what they would if they went back – if they were charged in Australia for the same offence.

40 THE CHAIR: Yes.

MR KELLY: But that wasn't the case.

45 THE CHAIR: But I don't think the fact that someone's sent home means that it's warlike.

MR KELLY: I'm not suggesting it's the discriminant for warlike service, I'm just saying there are anomalies in all of this.

5 THE CHAIR: Sure. I know there's anomalies everywhere.

MR KELLY: It doesn't make your task any easier, but it's just the reality.

10 THE CHAIR: Yes. But does anyone else want to put forward what they think is a silver bullet?

MR FULCHER: The enemy threat, and the deployment to meet that enemy threat. You don't get that in anything but warlike service.

15 THE CHAIR: That's not right. The definition – I mean, we did not have an enemy. The Malaysians had an enemy. We were not at war. There was hostile forces that might attack, that's covered by the definition of non-warlike. It may also, depending on the nature of the threat, get into warlike, but it's not consistent only with warlike.

20 MR FULCHER: I disagree. It is. I disagree that an enemy – they were not an enemy. In some of the pages they did define as an enemy. If we were sent there, because they might attack the base, and we were there to prevent that and to kill them if necessary, they were an enemy. And we were engaged in the Malaysian – whether the government wanted – we know why the government didn't want to declare us on operations, because of their political sensitivities and because of the Malaysian political sensitivities. That doesn't mean we weren't engaged in that war.

25 THE CHAIR: Well, we can note your comment, I don't think we debate it now. But in terms of the definition, what you've said doesn't drive you inexorably into the definition of warlike. It's still consistent with non-warlike.

30 MR KELLY: Same can be said of Ubon, Chair.

THE CHAIR: Well, our focus, let me say is RCB.

MR KELLY: Is RCB.

40 THE CHAIR: I know there's a seat of principle that says comparable service should be deal with comparably. We haven't had the benefit of Defence analysis about whether any of those other attachment F engagements were comparable. You know our view about that.

45

MR KELLY: Mm.

THE CHAIR: But at the end of the day, you know, there's an old principle,  
two wrongs don't make a right.

5

MR KELLY: Maybe.

THE CHAIR: And if one of them was classified as warlike when it  
shouldn't have been, that doesn't mean RCB becomes warlike. And if one  
10 of them was correctly classified as warlike, that doesn't mean RCB gets  
warlike, unless it meets the definition.

MR KELLY: No. Indeed. Except that Ubon was originally classified as  
non-warlike.

15

THE CHAIR: Yes.

MR KELLY: And then was subjected to the scrutiny of the Tribunal, and  
then reclassified. Their circumstances didn't change because they are  
20 historic, the same as ours as historic. However, they were in a country at  
peace.

THE CHAIR: Yes.

25 MR KELLY: We were in a country at war. Never a shot fired in anger.

THE CHAIR: Yes.

MR KELLY: At Ubon. Similarly – our circumstances are quite similar.  
30 And yet, because the Americans were involved, and there was a lot of  
political pressure to judge them similarly I guess, we could say the same  
thing about Malaysians were involved in a war. Now, I know that Defence  
doesn't agree that there was an insurgency. The facts say otherwise. All  
we're saying is that, you know, we be judged on the facts as well, of what  
35 actually happened, rather than what was – might've been policy or political  
rhetoric.

THE CHAIR: Yes. Well, political rhetoric's not going to sway us.

40 MR KELLY: No. I know.

THE CHAIR: Yes.

MR KELLY: But I'm just saying, it's a flavour of the issue.

45

THE CHAIR: Yes. All right.

5 MR MARSH: I go back to what was said before – and I recognise there is no silver bullet. I would agree with that. But the fact is that, at the time, senior military commanders considered there was an enemy, and that is spelt out in some of those documents. Where enemy points of attack are clearly marked in - - -

10 LIEUTENANT COLONEL MICKELBERG: JOIs.

15 MR MARSH: - - - JOIs and whatever, where they talk about the enemy. They talk about the enemy has the potential. So there is talk of the enemy. So at the time, there was a clear understanding that there was an enemy, and that Australian forces at Butterworth were facing an enemy threat.

20 THE CHAIR: Yes. Look, I – it’s possibly semantics, but I’m not disagreeing with you. But the important point is that there was a risk that those people might attack, and if that happened you would be engaging with them in hostile war – in hostile action. But the question comes, was the risk great enough to take you out of non-warlike, into warlike. And - - -

25 LIEUTENANT COLONEL MICKELBERG: So, Mr Chair, I’m just trying to come to terms with: you’re interested in trying to identify “was there an enemy”. One of the things that we’re going to do is go away and have a look at, dare I say it, submission 66, and distil out of it official documents – primary source documents that indicate that. But a case in point that I’ll give you just by way of one example, “Strategic and International Policy Division review of Butterworth deployment”, dated 22 October ’76, acknowledged the possibility of acts of terrorism in the Butterworth and Penang areas and that, quote, “Australian personnel including dependants and equipment would be endangered”. Now, does that – is that something that suggests to you that there was an enemy?

35 THE CHAIR: I think – you know, look, it might be semantics, but - - -

LIEUTENANT COLONEL MICKELBERG: (Inaudible words.)

40 THE CHAIR: - - - it seems to me that Australia was not at war with the CTs. In that sense, they were not an enemy. If they attacked the base, your rules of engagement allowed you to deal with them, and they would then become an enemy. But, you know, unless and until, I think it’s probably inappropriate to classify them as an enemy. But – yes, as I said, that might be semantics. The question really is, was the threat of that happening sufficient to get you out of non-warlike, into warlike.

45

5 LIEUTENANT COLONEL MICKELBERG: So I guess we can demonstrably show, via primary source documents from the departmental secretary level who's briefing up to the prime minister, and through to the COSK, through to service – individual service chiefs, and in particular the chief of the air force, them stating in writing that they have serious concerns about the safety of the base, the safety of our Defence personnel and property and dependants, and that measures need to be put in place to mitigate those risks, and they direct what measures they should be, and they end up taking them, like revetments and - - -

10

THE CHAIR: Yes.

15 LIEUTENANT COLONEL MICKELBERG: And – I guess what I'm getting at here is it's a chain of events or outcomes that is an acknowledgment that there's a threat, a recognition that there might be risks to our interests, and as a consequence, "All right, get on and do something". So in the first instance, the first thing that was done was COSK met and said, "Right, we need to provide guidance to the base commander, to produce a shared plan with the Malaysians who now own the base, for the defence of the base, because we've got assets there".

20

THE CHAIR: Mm.

25 LIEUTENANT COLONEL MICKELBERG: And that plan was produced, and as a result of that, cascades down – as I alluded to earlier – a mission that captured the military objective, tasks, ROE, et cetera, et cetera. To me, that's the only way, when considering the bigger picture of "is it warlike or not", that your deliberations, in my view, need to focus. It can't be on just "was there a risk". It has to be the look and the totality of this matter.

30

35 THE CHAIR: Yes. And look, I don't disagree with any of that. It would be foolheartedly and negligent for Defence to say, "Oh, there's a risk. We'll do nothing about it". They obviously had to do something about it. What they did would be governed by the assessment of the risk. A risk – if they assess it as low, then they do certain things. If they assess it as medium or high, they might do other more significant things. But, you know, that - - -

40 LIEUTENANT COLONEL MICKELBERG: So some of that documentation shows, at different times - - -

40

THE CHAIR: That documentation, I don't think, gives you a silver bullet.

LIEUTENANT COLONEL MICKELBERG: But does it – I mean, is it of interest to you that we bring this documentation to your attention or not?

Because obviously it's going to involve a degree of effort on our part to do that. I know it's already there, Russell, but - - -

THE CHAIR: If you - - -

5

LIEUTENANT COLONEL MICKELBERG: - - - the capacity of the Tribunal to interpret 1.8 gigabytes of information is a challenge.

THE CHAIR: Yes. If you want to draw it to our attention, as we've said throughout, there's no way we want to close you down and stop you being heard.

LIEUTENANT COLONEL MICKELBERG: I just want to get the parameters of how we want to attack this.

15

THE CHAIR: If there's anything you want to say, say it.

LIEUTENANT COLONEL MICKELBERG: All right. Thank you.

THE CHAIR: Okay.

20

MR KELLY: Chair, when you talk about identifying an enemy, in the preparation to deploy from Australia, the troops that went to Butterworth over the 21-year period were all told there was an enemy, and we trained for the possibility of encountering that enemy.

25

THE CHAIR: Mm-hm.

MR KELLY: So again, we go back to the troops on the ground and what they experience. They were told – we were told – I was one of them – that there was an enemy, and this is who they are. So even though Australia wasn't at war with the CTs, and even though Australia wasn't to – to accept the threat wasn't considered high enough that we'd encounter them on the first day we got there for example, but we were still given an identified enemy.

30

THE CHAIR: Okay. But look, even if that's right – and I'm not saying it's not – that, I don't think, is a silver bullet.

MR KELLY: Oh, no, I'm not suggesting it's a silver bullet.

40

THE CHAIR: Okay. So this item is all about silver bullets.

MR KELLY: Okay.

45



THE CHAIR: Okay?

MR KELLY: All right.

5 MR FULCHER: I didn't understand that.

THE CHAIR: Yes. Well, that's what the item says, and that's what I ask. Does anybody say – and I guess this is predominantly asked of Defence – that there's anything in the uncontested facts that was consistent only with  
10 it being peacetime service. That - something that just wouldn't – couldn't happen if you were in non-warlike or warlike.

BRIGADIER HOLMES: Couldn't happen.

15 THE CHAIR: Yes. Yes.

BRIGADIER HOLMES: So I'm just – I'm referring to the 13 bullet points in our enclosure 1 of our January submission as the framework of the key things. So from DP1, down to the nature and relevance of duties undertaken  
20 away from the airbase. You're talking about 136 submissions. 30 with subparts. The private submissions. You're talking about all of the things? Or are you talking about the list of assertions of fact that you've provided to us in the past?

THE CHAIR: I'm talking about the totality of what's been put in evidence in submissions that you haven't contested. Do you say there's – amongst all of that – a silver bullet that means that RCB service could only ever be  
25 peacetime. So it's the mirror of the question that I've just asked the veterans.

30 BRIGADIER HOLMES: We'll get into the other thing.

MR ROBARDS: Yes.

35 BRIGADIER HOLMES: Sorry, I've just received a note. So the – and distracted me slightly.

THE CHAIR: Okay.

40 BRIGADIER HOLMES: The – because it's an area that you don't want to talk about. I mean, the key piece here are the families that are a part of this deployment.

THE CHAIR: Mm.  
45

BRIGADIER HOLMES: Where you've got, you know, 1200 air force personnel and 600-odd family members and whatever else on and around the base all at the same time, which is very, very similar to the circumstances of most of the Defence activities and operations where we operate within our country in exactly the same circumstances. So in terms of all of the things unique to – and the opposite of what you've asked the veterans – all of these things occur in peacetime. We deploy to a particular area. Or go to a particular lot of training. Moving around. All of the activities are reflective of peacetime service.

THE CHAIR: Yes. But is it a silver bullet, in the sense that families were sent and stayed and lived off base and so on, all those points, and veterans went off base, out of uniform, to go to bars, whatever, in circumstances where it was known that there was a threat, albeit a low level – assessed low level. So that seems to me to be a fact that is equally consistent with peacetime and non-warlike. Whether it's con – I suspect it's not consistent with warlike. So, you know, (indistinct).

BRIGADIER HOLMES: I guess my concern is I don't think it's as clear and definite as you would like.

THE CHAIR: Yes. But I've got – we've got to ask the question. If there's a silver bullet, we need to know about it. Okay? But I – personally, I don't think there is.

BRIGADIER HOLMES: There is not a single silver bullet.

THE CHAIR: Yes.

BRIGADIER HOLMES: Is the question.

THE CHAIR: Yes.

BRIGADIER HOLMES: But they overlap. All of these things occur in all of those circumstances.

THE CHAIR: Yes.

BRIGADIER HOLMES: Except maybe families on warlike service.

THE CHAIR: Yes.

BRIGADIER HOLMES: And – and - - -

THE CHAIR: Yes.

BRIGADIER HOLMES: I'll leave it at that.

5 THE CHAIR: Yes. And without wanting to pre-empt the discussion, it seems to me that there's no single fact that could only happen on non-warlike service and couldn't happen on warlike and couldn't happen on peacetime. That there's nothing about the facts that drives you to a particular conclusion. There's no silver bullet in any of them.

10 MR MARSH: Mr Chair.

THE CHAIR: If anyone wants to contest that. Yes.

15 MR MARSH: No, I won't contest.

THE CHAIR: Yes.

20 MR MARSH: I want to say this, as a former RAAF member who served at Butterworth and who took my family there between 1977 and 1980. History shows that through the first emergency and the confrontation with Indonesia, military families were part and parcel of the deployments to Butterworth. They were there. Not only Butterworth. The whole Malaysia peninsula area. If I get a bit emotive about this, I'll try and control myself. Now, Defence – I would argue that military families at Butterworth were at more danger in the 1970s than the 1958 to '60 period because Butterworth was declared a white area, and I've got a newspaper report somewhere, back about 1956. A white area meant that it was out of the emergency. We heard evidence yesterday about curfews, road blocks. Those things didn't happen in white areas. They happened in black areas. That's where the communists were active. Defence continually point to the fact that families were at Butterworth, therefore, it must be bloody peacetime service – excuse the word.

35 I look at the JIO assessments and I see that there were potential threats to families. Our families were considered possibly more likely to be attacked than the infrastructure on the base because they were next to the base and they were an easier target. They said they could possibly be kidnapped. How would you know they were going to be kidnapped until they were kidnapped or shot. Defence continually point to these families being there as evidence of peacetime service and that we shouldn't get any recognition and yet at the time the documents show there were real risks. We had family protection plans. We had all that.

45 There was a submission made by a Paul Copeland which you may have seen. He was a child there at the time and he has included memories of his

time and others. In a submission I made, I have copied comments off Facebook pages about families. They saw the red flags. They saw the booby traps. They knew they were there. They were told as school kids, “If this place comes under attack, you’ve got to run into the jungle”.

5

There was actually a child and this is in Singapore – I know that Singapore is a long way away but it was at the extreme end – there was a British schoolgirl killed there in 1971 with a booby trap placed in a children’s playground. That could have been my child. It could have been the child of any veteran at Butterworth because it shows booby traps were common in use around the place. To say that this was peacetime because the families were there is a total insult to the memory of the families. Some of those kids, when we came back, we couldn’t even talk about our experience in Australia, living with 24-hour curfews, living with curfews. We couldn’t even talk about that because thought we were lying.

10

15

THE CHAIR: Yes.

MR MARSH: I’m sorry if I get a bit emotive.

20

THE CHAIR: No, no, no, I understand the emotion and you’re well entitled to it. I think while Defence has raised that as in its discussion of the non-warlike definition and the discussion of the 2018 peacetime definition, I think you just heard the brigadier say that’s not a silver bullet. It’s not a definitive of peacetime.

25

MR MARSH: Yes, I know. It’s just the fact that they keep bringing it up is the thing that angered me.

30

THE CHAIR: Yes, okay. That’s understood.

MR KELLY: Chair, the original emergency, Australian Army troops were deployed to Malaya and so were the families.

35

THE CHAIR: Yes. So, I think the situation is that being accompanied by families is not determinative and it is presumably agreed or not agreed, depending on the assessment of risk.

40

MR KELLY: Yes, it’s only an indicator.

THE CHAIR: But it’s not a silver bullet. Okay. So, we thought it was important to pose those questions, is there a silver bullet and I think the answer is no there isn’t for any particular classification. Okay.

Let's talk about New Zealand. Now, in November I asked the veterans, do you say that the New Zealand reassessment adds or leads to the conclusion that RCB service was warlike and I think your answer was, no, you didn't put it that high. I said to you the New Zealand reassessment was argued as a reason for the minister setting up this inquiry. But I think essentially New Zealand thought that they were upgrading their medals in their system to something that they viewed as equivalent to the ASM. But they didn't come to the view that New Zealand's service in Butterworth was warlike. Is that a fair summary of your view of the relevance of New Zealand reassessment to what we're looking at?

LIEUTENANT COLONEL MICKELBERG: I think the reports says two things: firstly, the genesis of the report was based on documentation provided by these people.

THE CHAIR: Yes.

LIEUTENANT COLONEL MICKELBERG: Which has been provided to you, dare I say it, in the submission 66. But it was provided by Russell Linwood to the New Zealand veterans, who then presented it and that precipitated that inquiry. As you no doubt have read the report and they make the point in the report that one of the reasons why they didn't recommend the award of the operations service medal warlike was because their infantry personnel who were deployed up from Singapore to Butterworth were usually only there for 30 days or less. Of course, the difference between them and us is we were there for three months.

But in answer to your question, my own personal view is that the New Zealand report doesn't take us very far down the road in terms of your deliberations. It was a mechanism that we used to precipitate a meeting with Minister Gee that the end result was, or the objective was, the military objective was to get an inquiry, which we got.

THE CHAIR: Yes, thanks. Mr Marsh?

MR MARSH: I would go along with what Mr Mickelberg said. My memory of the report, I should have read it again recently, it does talk about the timeframe in that they needed to be there for a certain period of time to have warlike service and they were not there for that period of time. But they did not rule out and this is part of their problem and if you read the report, they had a problem with the operational service medal because they accepted at the time, and they use this risk matrix approach, whereas we just used, "Well, was it warlike service? Was this, this and this?". That doesn't go into that risk matrix approach. They say in there that at times it may well have been warlike service but they wouldn't have been there long

enough to have the service required. So, they do not rule out that it was warlike service, it just doesn't fit their criteria.

5 THE CHAIR: I don't think they go so far as to say if anyone had been there for the requisite period, it would have been warlike.

MR MARSH: I'd have to go back and look at it again.

10 THE CHAIR: Yes.

MR HANNAFORD: I think they took the easy way out, Chair.

15 THE CHAIR: Well, I don't want to produce our New Zealand cousins but the real question is does their conclusions aid your case. I think they aided your case to get this inquiry. I don't think, and I think you're agreeing, didn't get you to a compelling case for warlike in Australia. Colonel?

20 UNIDENTIFIED COLONEL: Sir, may I briefly add to the (indistinct) view of New Zealand's (indistinct) is noteworthy, because (indistinct) in all New Zealand service across all of Malaysia including people who never went to Butterworth. And also, looks at far longer than New Zealanders who did deploy to Butterworth were in target. (Indistinct) assessed the Malaysian (indistinct) and the New Zealand in country battalions were located, companies (indistinct) Rifle Company Butterworth in September 1973 (indistinct). The New Zealand review that led to the (indistinct) New Zealand service for much longer (indistinct) didn't know Butterworth at all. (Indistinct) Malaysian. that conceptualises all (indistinct). We are talking about service in Butterworth, and that's something I'd (indistinct).

30 THE CHAIR: Yes, point taken but I think it doesn't aid the case that Australian CB service was warlike. So, the mirror image question for Defence is whether there is anything in the New Zealand reassessment that supports the proposition that RCB service was peacetime.

35 DR ROBARDS: No, Chair. You've already highlighted it.

THE CHAIR: Yes.

40 DR ROBARDS: It brings that to a comparable level to what RCB has already recognised.

BRIGADIER HOLMES: For medallic purposes.

45 THE CHAIR: Yes, for medallic purposes, and look, I think that's an absolutely correct concession. It was important for New Zealand veterans.

5 I think New Zealand veterans probably owe a debt of gratitude to the  
Australians who provided the information and let it happen in New Zealand.  
But I don't think it drives an outcome in our inquiry. Okay. I think we've  
now covered everything that I was suggesting we ought to be covering this  
afternoon by reference to the agenda that we circulated before these  
hearings commenced. But I wouldn't want to close without giving the  
veterans an opportunity, if they wish, to make any closing statement and,  
similarly, Defence. So, we have time, not infinite but we've got time. You  
can certainly take more than 30 seconds, so we're in your hands. Mr Arthur?

10 MR ARTHUR: I said in my first submission that there was probably never  
going to be a single document that answered the case either way and from  
my reading of it, it's evident that there may not be documents to prove the  
case either way. So, I guess my one and only point is we really need to  
15 examine the full context of everything because nothing happens in an  
absence of that and neither, I don't think, Defence will be able to get that  
silver bullet. I'm pretty sure we can't because it either never existed in the  
first place, or is otherwise unavailable. So, that's all I would just like to  
say.

20 THE CHAIR: Yes, and let me say to you, (a) I think that's right. I think  
you're proposition in your first submission was prescient. But rest assured,  
we're looking at absolutely everything that we can find. I hope what we've  
done today in terms of making all our research available, making all the  
25 submissions available and so on and so forth does satisfy you that we're  
trying to look at everything. We're not just sitting here like Solomon and  
dividing babies that are put before us. So, I hope you feel the same.  
Mr Fulcher?

30 MR FULCHER: Yes. I want to go back to my comments, my closing  
comments. I'm not going open up a new discussion. I just want to go back  
to the medals policy and some of the things that were said in the medals  
policy which I believe are pertinent. Under the heading of CEDA, it says,  
and this is at paragraph 10:

35 *During its deliberations, CEDA established 10 guiding principles  
which have been accepted as the basis for the awarding of medals  
for service, particularly when assessing past activities. These do  
not detract from the conditions agreed by the three services in  
40 1992, but assist in assessing entitlements on the basis of equity.*

Then it goes on to say:

*In addition, the CEDA principles need to be applied in assessing the relative merits of service, particularly those which are being assessed in respect of the past.*

5 Now, we've had the - - -

THE CHAIR: What paragraph are you?

MR FULCHER: It's paragraph 30.

10

THE CHAIR: Thirty?

MR FULCHER: Yes. Now, we've put up the comparative service matrix, which Defence has declined to respond to, was indicated in there that a lot of the deployments in there - will be you'd have to say there's a lot less expectation of casualties than there were for RCB. Things like Ubon, Diego Garcia, Somalia. So I think it is - I think the tribunal should take a close look at that for the purpose of equitable handling.

20

Now at the first hearing the Chair said that RCB veterans under the Cabinet Directive 1048 met the - or were eligible to be allotted for duty because they had met the Cabinet Directive 1048. Now if Defence had done its job properly back then we wouldn't be here today. If Defence had allotted us for duty well, you know, we wouldn't be sitting here with you today. And I think that the tribunal should take that into question to considerations and equitable consideration too, that we're only fighting in this on this ground now because back then the right thing wasn't done.

25

THE CHAIR: Can I just - I'm not wanting to cut you off in any way but can I just make a comment about that?

30

MR FULCHER: Sure.

THE CHAIR: I don't think I said what you attributed to me at the previous hearing. But whether I did or not what my present view is that meeting the 1965 test for allotment isn't enough. You can only be allotted, you could only be allotted under the Special Overseas Service Act if there was a warlike operation or civil disturbance, whatever the phrase was. So meeting that test, which was from memory an exposure to risk test, only became relevant if you had a warlike operation, which at that stage as far as I know there was no definition. Then along comes '93 and we've got a definition which is capable of applying retrospectively.

40



MR FULCHER: In response to that, I'd have to go back and look at it more clearly but - and I can't even remember where it comes from but allotment for duty was considered warlike. Yes, it was.

5 THE CHAIR: You've got - I don't think warlike existed as a term at that stage, you've got allotted for duty where the conclusion was reached that you had a warlike operation. Yes, you had to meet - there was a whole lot of tests under the SOS Act but you had to meet them all. And the first fundamental test was; was there a warlike operation.

10 MR MARSH: Mr Chair, that is dealt with by Moore J in 2000 and he points to the fact that army and air force chiefs failed to allot veterans when they should have been allotted. And he considered it unfair that those veterans should be penalised because of the administrative failures of their chiefs.

15 THE CHAIR: And the 1965 interdepartmental committee recognised that there was inconsistency in practice between army, navy and air force and said, "We need a rule for when people should be allotted".

20 MR MARSH: Yes.

THE CHAIR: And it came up with a rule. But that rule was only applicable where you had a warlike operation.

25 MR MARSH: Yes, but that's what I say, if you look at Moore J, and I'm sure it's chapter 2, it might be chapter 1, but I'm sure it's chapter 2, he says the fact is that allotments were not made when they should have been made according to that Cabinet Directive.

30 THE CHAIR: Yes, but - - -

35 MR MARSH: And that is admitted by - in the registration of instruments in 1999/2000. We didn't allot until after the deployment was over. And they allotted in 2000 or 19 - right back to 1950. So, we - and I think it's fair for us to argue that we were disadvantaged by the fact that we met those requirements for allotment but they were not applied because this had been going on for years and we were not allotted and yet we met the requirements for allotment.

40 THE CHAIR: The distinction is a bit subtle but I think you would have met the allotment test if there had been a warlike operation and there was never a determination that there was a warlike operation.

45 MR MARSH: I think the - - -

5 THE CHAIR: Fast forward, that legislation is repealed, the whole question is irrelevant. To get where you want to be you've got to operate under the VEA. Allotment is not relevant to your circumstances under VEA, it's only allotment for schedule 2. You need to fit in to the definition of warlike and a warlike definition doesn't talk about allotment.

MR MARSH: No.

10 THE CHAIR: And, you know, I don't want to be thought to be saying that you were unfairly treated because you were not allotted.

MR MARSH: Yes.

15 THE CHAIR: I would say that if you had met, if your service had met, the warlike operation requirement and you were not allotted you would then have been unfairly treated.

MR MARSH: Yes.

20 THE CHAIR: But that's a different thing.

MR FULCHER: I didn't want to get into an argument, I just - - -

25 THE CHAIR: No, I know. And these are all important points and you have views and we want you to be able express them but I think it's important that we say to you where we are currently standing.

30 MR FULCHER: Okay. Look, you said they were eligible for allotment at one hour, three minutes, and one second on the tape, if you want to check it?

35 THE CHAIR: Yes, but it would be in the context of meeting the allotment test but the test is only applicable if you are in a warlike operation.

MR FULCHER: But there was no such thing as a warlike operation.

40 THE CHAIR: There was. You read the SOS Act, it's there in black and white.

MR MARSH: The Cabinet Directive was they should be allocated for duty if there was an on - if there was a potential risk, I think the word is, from the ongoing activities of insurgents.

45 THE CHAIR: Yes.

MR MARSH: And the potential risk from the ongoing activities of - - -

5 THE CHAIR: But in the context that allotment decision only arises where you've got a warlike operation. Or whatever the other phrase is, civil disturbance - - -

10 MR FULCHER: But I go back to the reason, the initial reason why we were not allotted, the initial reason why it wasn't declared a warlike operation was political and I don't think we should be made to suffer for that. And now I'm just making a statement, I don't want to have an argument and - - -

15 THE CHAIR: No, and I don't want to argue about that. The reasons things happened, you know, we can talk about but the question is today can we recommend for you what you seek.

MR FULCHER: Yes.

20 THE CHAIR: And allotment is irrelevant.

MR FULCHER: I don't disagree entirely with that but I think equity is an important principle that you - all I'm saying is you need to take consideration of it.

25 THE CHAIR: Equity is terribly important but equity isn't reflected in the legislation that we're trying to work within.

30 MR FULCHER: Well that's why equity was invented, because black and white law doesn't always give you justice and that's why equity was invented. That's why I'm saying you need to have a look at equity. The only last thing I want to say is I agree that nobody is going to be prove this thing beyond a reasonable doubt, it's the balance of probabilities that need to be considered.

35 THE CHAIR: Yes, and no question that it's the balance of probabilities that we're working with. No suggestion that you bear an onus of proof. The only onus is on us as a tribunal to form a view on the balance of probabilities. Defence doesn't bear an onus. You don't bear an onus.

40 MR MARSH: I think, Mr Chair, what you say about equity that was very much the issue with CEDA, with Clarke and with Moore. When you look at what the politicians said at the time they were concerned with equity. Which means that if we have been - if we are treated any differently in a

way of assessment of threat or risk or whatever, if we are assessed at different criteria than were applied back then we are not treated equitable.

5 THE CHAIR: Yes, and I think we could only say that you were treated inequitably by not being allotted if we were of the view that there was a warlike operation.

MR MARSH: Yes. And if there was a warlike operation it would become warlike service under today's definition.

10 THE CHAIR: Essentially that's right.

MR MARSH: Yes.

15 LIEUTENANT COLONEL MICKELBERG: So, Mr Chair, you are no doubt aware of Moore's Principle, I've quoted. It was flagged by the CDF in a brief to Minister Scott in 2000. One very significant principle established by MAJGEN Moore during his deliberations on service in South East Asia was that:

20 *If ADF personnel are placed in circumstances where they may be used to react to an assessed threat made by an Australian Government Intelligence Agencies it has to be considered operational service. This is regardless of whether the threat is realised or not.*

25 CDF Minute 7 of 2001 in the first in the ADF Medals Policy, where we've been and where we are going. Pretty clear cut to me. That was briefed to Minister Scott and I would conclude by just saying that the RCB  
30 personnel, and the only people who can evidence to this, are us, who were on the ground, we were trained, armed and equipped to defend the air base. We had orders to use lethal force in the defence of the air base and the threat of CT attack.

35 This is RCB deployment to Butterworth was not for training purposes. And that's been acknowledged not by our own government, I might add, not by our own CDF - but thank you, Jay, if you would just put up this slide - by this gentleman, the Malaysian CDF who on the 50th  
40 Anniversary thanked us for protecting the air base. Our government didn't bother. And neither did the CDF. Neither did the Chief of Army. They glossed over it. They ignored these veterans. And as far as I'm concerned that's a gross insult.

45 THE CHAIR: Well I'm not going to respond to that other than to say that you weren't ignored, you were given the ASM. You would rather have

had the AASM and you would rather have had, quite understandably, the better veterans' entitlements. But I don't think you can fairly say you were ignored.

5 LIEUTENANT COLONEL MICKELBERG: Well, I mean, on the 50th Anniversary we were ignored.

THE CHAIR: Right.

10 LIEUTENANT COLONEL MICKELBERG: The Morrison Government said they would acknowledge with a ceremony in Canberra, that didn't happen. Why, because of COVID. They then said, "Oh, we'll do it next year". It's never happened. That doesn't surprise me, I might add. But I guess the point I'm trying to make here is this is an opportunity for the  
15 tribunal to right what is fundamentally a wrong.

Now the people in this room all know the truth, they were deployed there for an operational purpose, a warlike operation. They represent the army veterans and the air force veterans who were deployed there for that  
20 purpose. And I think this is the time for us to right this. Regardless of any further prevarication by Defence, which has been ongoing for God knows how many years, we've got to draw a line in the sand here and fix this.

25 THE CHAIR: Yes, look, I'm certainly all in favour of drawing a line in the sand and getting to a final answer.

MR MARSH: I appreciate all your comments, Mr Skehill, I really do. It is significant I think that there is a statement there that the Malaysians  
30 appreciate our support, that if Australia had of withdrawn it would have had a significant detrimental effect on the ability of the Malaysians to fight the war against the communists. It is also acknowledged that Australian veterans were defending vital points which were vital to the Malaysian war effort. So to say we were not involved in that war, I mean,  
35 we had a command who was, what? Was he expected to command this mob of troops that were on active service and this mob of troops that were on peacetime or non-warlike service when this mop of troops that were on so-called peacetime or non-warlike service could be called upon on at a moments notice to react, to defend to an attack on Malaysian assets,  
40 Malaysian vital points or even to protect Malaysian personnel. To say that was not – that our service was not in a sense equivalent to Malaysian service, seems to me to be totally illogical and nonsensical, you know?

45 THE CHAIR: Well, I hear what you're saying and we will certainly be giving it, you know - - -

MR MARSH: We have set out - - -

5 THE CHAIR: - - - a lot of consideration, rest assured. And when I said that were' looking for submission hopefully by the end of April I wasn't wanting to suggest that we'll be handing down a report on the 1st of May. We've got, you know, some sleep to lose and some angst to work through.

10 MR MARSH: Will we have a possibility to respond to your report before it's made public?

THE CHAIR: No.

15 MR MARSH: No, okay.

THE CHAIR: No, no.

MR KELLY: Chair, closing comments please?

20 THE CHAIR: Yes.

25 MR KELLY: I know for comparisons aren't always welcome, although Professor Stevens said the ROE or Butterworth were analogous to his experience in INTERFET and UNTAET, Somalia was awarded the AASM because the troops were under, and I quote; "hostile fire". That definition doesn't appear anywhere other than in that document where it states that.

30 Ubon was awarded AASM, it was recommended because they were on a war footing and neither of those expressions appear in the definitions, nor do they appear anywhere else except in those documents where they were expressed. And both of them were originally ASM and then later reassessed by the Tribunal to be worthy of an upgrade to a AASM.

35 There's probably other places and you can probably guess where I'm heading with this; they are all in the matrix and I appreciate your comments at the very start about why that was provided, that information, and you've drawn some fairly interesting conclusions from that.

40 There is no silver bullet; that's true. I think of documents that can be found but of course we've seen that documents can't be produced from one side of the argument when they can be produced by the other side even though the source is the same. So, good luck in finding documents about anything.

45

Really appreciate your efforts, really appreciate the Tribunal's openness to accept submissions as long as and as late as you have and the fact that you dealt with us all in my opinion quite fairly.

5 THE CHAIR: All right, thank you Mr Kelly, I appreciate those sentiments. Defence, do you wish to make any closing submission?

DR ROBARDS: Briefly, thanks Chair. Chair, I'd like to thank yourself and the Tribunal members for your time and support through this. I know  
10 that you've invested a lot of time going through some quite substantial submissions there and we appreciate your support through this. We have heard from a number of witnesses yesterday and today, there is a lot of variability between the experiences and I suppose that's probably not too surprising, given that we are talking about something that spanned 20  
15 years but also noting comments that to an extent some of the RCB rotations were largely left to their own devices, to an extent there.

There's been a lot of discussion around the threat, as you've acknowledged, there are no silver bullets in this leading to particular  
20 conclusion in either direction here. As outlined, we believe that the New Zealand decision does not have a bearing on this and certainly did not provide for a higher level of recognition than what currently exists for Rifle Company Butterworth service. The 1993 warlike definition does provide some examples of the types of service that would be characterised  
25 as warlike.

Defence does not believe that RCB service is comparable to those particular examples there. (Indistinct) Chair and Tribunal members, that  
30 we are not hiding any information, we are providing everything that we have available and making best efforts and time to provide that information as quickly as we can. And again, we'll make best efforts to have what we've promised, what you've asked for, by the end of April.

We are equally keen to see this draw to a close as soon as we possibly can.  
35 And finally, I would like to thank the service of the veterans and the time that they've put into this. I can see how much time and effort has truly been contributed to this and how much it means to the veterans and to families who are there to support veterans through all of this. so, I'd like to thank you for your time, your efforts and your service through all of  
40 that. Thank you, Chair.

THE CHAIR: Thank you, Dr Robards. And, we would, as a Tribunal, certainly echo your last thoughts; gentlemen, you've made an enormous effort over an extended period and you've done it in a voluntary capacity.

It's not your job unlike the people in Defence and ourselves, we are paid to deal with these issues, you've done it selflessly.

5 You've done it with enormous dedication and that's recognised and appreciated. Dr Robards, never any suggestion from us that you've been trying to hide things. We have appreciated the openness with which you've provided material and as I said this morning, we do appreciate that we've put a heavy burden on the Department. I would personally have liked to have seen some supplementary resources made available to help  
10 that happen but the fact it apparently didn't just increases our appreciation for what has been done.

DR ROBARDS: Chair, if you'll just indulge me for a little minute.

15 THE CHAIR: Yes.

DR ROBARDS: On that point, you do acknowledge the effort of Mr Heldon and his team. I would like to double up on that; they do a significant amount for this Tribunal as well as for members and veterans.

20 So, I've just got some figures here about what this a particular small team did achieve last year, receiving over fourteen thousand applications for awards, facilitate manufacturing and engraving, despatch of over twenty six thousand awards to current serving members and veterans; resolved  
25 over a thousand queries that came through from our customer access management channels; representation at around twenty different hearings for the Tribunal over the year and over three hundred pieces of ministerial correspondence throughout the year. So, there's a huge workload and as I said, the team will continue to produce; they do fantastic things and will  
30 keep doing them.

THE CHAIR: And look, as a Tribunal because we deal with the directorate on an ongoing basis in our review capacity we have some understanding of the magnitude of that workload and that's why I say, I  
35 think it would've been nice if they had been given some additional resource to cope with this one off, extraordinary inquiry. But, you know, apparently that didn't happen and that's water under a bridge but it does make our appreciation of the effort that has been put in that much greater.

40 So, I do want to thank everybody for their contributions. That extends to the Tribunal secretariat who have put in a major effort in getting submissions, getting them on to the web, responding to queries, arranging hearings; these things take a lot of arranging with live streaming and transcripts and everything that goes with it.  
45



5 We are, as a Tribunal blessed with our secretariat. They are only four strong and they do a great deal of work so they get a pat on the back as well. Thank you everybody for your time, for your patience, for your endurance, it's been very, very useful to us. We look forward to hearing any more by the end of April and as Sir Humphrey would say, "You'll hear from us in the fullness of time." Okay, all right. Have a good afternoon, everybody. Cheers.

10 **MATTER ADJOURNED**