Australian Government

Defence Honours and Awards Appeals Tribunal

INQUIRY INTO MEDALLIC RECOGNITION FOR SERVICE WITH RIFLE COMPANY BUTTERWORTH

LETTER OF TRANSMISSION

The Hon Matt Keogh MP
Minister for Defence Personnel and Veterans' Affairs
Parliament House
CANBERRA ACT 2600

22 August 2023

Dear Minister

On 7 April 2022 your predecessor, the Hon Andrew Gee MP, directed the Defence Honours and Awards Appeals Tribunal to inquire into and report on medallic recognition for service by members of the Australian Defence Force with Rifle Company Butterworth (RCB) during the period from 1970 to 1989.

The Tribunal's report of the inquiry is attached.

After detailed research far more extensive than that conducted on any prior occasion, whether by Defence or by independent reviews and inquiries, the Tribunal has concluded that RCB service was neither 'peacetime' (as currently, but not earlier, contended by Defence) nor 'warlike' (as claimed by RCB veterans), but was actually 'non-warlike' by reference to Government policy first enunciated in 1993 and not since changed on any properly informed basis.

As such, RCB service is currently and appropriately recognised by the award of the Australian Service Medal 1945-1975 or the Australian Service Medal and does not meet the eligibility criteria for the Australian Active Service Medal 1945-1975 or the Australian Active Service Medal. But, as such, it should now be formally accepted as 'non-warlike service' under the *Veterans' Entitlements Act 1986* and receive more beneficial claims treatment than that currently afforded – this would be consistent with a 2007 Ministerial decision supported at that time by Defence but not then implemented by Defence on behalf of the then Minister as statutorily required.

While these are the key findings of the Tribunal inquiry, a number of other consequential or systemic recommendations are contained in the attached report.

Yours sincerely

Stephen Skehill
Chair

Rear Admiral Allan Du Toit AM RAN (Retd)
Member

Air Commodore Anthony Grady AM (Retd)
Member

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GLOSSARY

ABB	Air Base Butterworth; see also BAB
Act	*Defence Act 1903*
ADF	Australian Defence Force
ADG	Airfield Defence Guard
an Australian Active Service Medal	Collectively, the Australian Active Service Medal 1945-1975 and the Australian Active Service Medal
an Australian Service Medal	Collectively, the Australian Service Medal 1945-1975 and the Australian Service Medal
ASM	Australian Service Medal
ASM 1945-1975	Australian Service Medal 1945-1975
AASM	Australian Active Service Medal
AASM 1945-1975	Australian Active Service Medal 1945-1975
ANZUK	Australia New Zealand United Kingdom
BAB	Butterworth Air Base
CAS	Chief of Air Staff
CDF	Chief of the Defence Force
CDFS	Chief of the Defence Force Staff (organisational predecessor to CDF)
CIDA	Committee of Inquiry into Defence and Defence Related Awards
Clarke review	Review of Veterans' Entitlements 2003
COBS	Commanding Officer Base Squadron
COSC	Chiefs of Service Committee
CTs	Communist terrorists, whether individually or organisationally
DAFI	Directorate of Air Force Intelligence
Defence	Collectively the Department of Defence and the ADF
DFAT	Department of Foreign Affairs and Trade
DOWR	Degree of Weapon Readiness
DVA	Department of Veterans' Affairs
FPDA	Five Power Defence Arrangements
GDOC	Ground Defence Operations Centre
JIO	Joint Intelligence Organisation; now Defence Intelligence Organisation (DIO)
MAF	Malaysian Armed Forces
MCP	Malayan/Malaysian Communist Party
Mohr review	Review of service entitlement anomalies in respect of South-East Asian Service 1955-1974
NOS	Nature of Service, or the Nature of Service Branch or Directorate within Defence
OFOF	Orders for opening fire
QRF	Quick Response Force
RAAF	Royal Australian Air Force
RAF	Royal Air Force
RCB	Rifle Company Butterworth; the Tribunal has used the term RCB for all Australian rifle company detachments over the period 1970 - 1989, noting that over time detachments were known variously as the ANZUK Company, the Australian Army Company (AAC), the Australian Rifle Company

	Butterworth (ARCB) and the Australian Army Rifle Company Butterworth (AARCB).
RCB service	Service with Rifle Company Butterworth at any time between 1970 and 1989
RCB veteran	An ADF member who has at any time performed RCB service
RCB representative organisations	The RCB Review Group and the Australian Rifle Company Group Veterans 1970 - 1989
ROE	Rules of Engagement
Repatriation (FESR) Act	*Repatriation (Far East Strategic Reserve) Act 1956*
Repatriation (SOS) Act	*Repatriation (Special Overseas Service) Act 1962*
RMAF	Royal Malaysian Air Force
VEA	*Veterans' Entitlements Act 1986*
Veteran Gold Card	A treatment card that entitles the recipient to clinically required treatment for all medical conditions.

EXECUTIVE SUMMARY

1. The Australian Army's Rifle Company Butterworth (RCB) was deployed to Air Base Butterworth (ABB) from 15 November 1970, prompted by the assessment that neither the security provided by the Royal Malaysian Air Force (RMAF) at its ABB, nor that provided by the Royal Australian Air Force (RAAF) guards, was adequate to defend RAAF and related personnel and assets located there if ABB was attacked by Communist Terrorists (CTs) then conducting an insurgency against the Malaysian Government. That assessment was the proximate cause and purpose of RCB deployments, and they were never for the sole or predominant purpose of 'training' as was asserted at times for 'diplomatic nicety' or 'political expedience'.

2. RCB provided additional security for RAAF and related personnel and assets at ABB, and for ABB more generally, against the possibility of such an attack until 31 December 1989, around the time the leader of the Malayan Communist Party, Chin Peng, signed a peace accord with the Malaysian Government. After that date, while RCB had and the Australian Army still has a continued presence at ABB, it was and is for other purposes.

3. RCB was initially based around one-month deployments by Australian, British and New Zealand Army personnel based in Singapore, until 1 September 1973 when Australia became solely responsible for the provision of the rifle company, implementing three-monthly rotations from Australia.

4. Between 1970 and 1989 approximately 9,000 Australian Army personnel undertook one or more rotations to ABB with RCB. Those personnel are referred to in this report as 'RCB veterans', and their service on these rotations during those years is referred to as 'RCB service'.

5. RCB service is currently recognised by the award of either the Australian Service Medal 1945-1975 (the ASM 1945-1975) or the Australian Service Medal (the ASM), because that service has been declared by the Governor-General, on the recommendation of the Defence Minister, to be a 'non-warlike operation' under the Regulations governing each of those Defence awards. Unless otherwise referenced, throughout this report the term 'Australian Service Medal' is used to collectively refer to the ASM 1945-1975 and the ASM.

6. On 18 September 2007 the then Minister for Veterans' Affairs, the Hon Bruce Billson MP, acting for the Minister for Defence, declared RCB service from 15 November 1970 to 6 December 1972 to be 'non-warlike service' and from 6 December 1972 to 31 December 1989 to be 'hazardous service' for the purposes of the *Veterans' Entitlements Act 1986* (the VEA). However, those declarations did not operate to confer on RCB veterans the intended beneficial treatment under the VEA because they were not registered on the Federal Register of Legislation as required by the *Legislation Act 2003* and thus did not enter into force. Accordingly, RCB veterans currently have only base-line entitlements under the VEA - they

are ineligible for the service pension or Veteran Gold Card they seek and any claims they make for compensation for service-related incapacity are required to be decided on the balance of probabilities rather than on the more favourable reasonable hypothesis/reverse criminal onus basis intended by Minister Billson.

7. Since at least 2006, RCB veterans have been seeking recognition of RCB service as 'warlike' rather than 'non-warlike'. They have done so in the expectation that such recognition would make them eligible for an Australian Active Service Medal, that they would become entitled to service pensions and Veteran Gold Cards under the VEA, and that they would have any claims for compensation for service-related incapacity decided on the more favourable reasonable hypothesis/reverse criminal onus basis.

8. If RCB veterans are to be awarded an Australian Active Service Medal and the veterans' entitlements they seek, two separate ministerial actions would be required. First, a Minister within the Defence portfolio would have to recommend to the Governor-General under the regulations governing the Australian Active Service Medals that RCB service should be declared to be a 'warlike operation' and, secondly, the 'Defence Minister' would have to determine under the VEA that RCB service was 'warlike service'. There is nothing in the legislation that states that, if one such ministerial action is taken, the other must necessarily also be taken. However, the Tribunal observed that, in practice, one has generally followed the other.

9. The terms of reference for this current inquiry issued under section 110W of the *Defence Act 1903* (the Act) require this Tribunal to consider *issues pertaining to medallic recognition for service with* RCB. Under that section the Tribunal may include in its report any other recommendations *that the Tribunal considers appropriate and that arise out of or relate to the inquiry*.

10. The requests by RCB veterans for 'warlike' recognition have been considered by a number of independent external inquiries (including an inquiry by this Tribunal that was completed in 2011). None of those inquiries have concluded that RCB service was 'warlike'. However, the reasons given for the conclusions reached by those inquiries contain only limited analysis and it appears that they were arrived at on the basis of significantly less evidence and far fewer and far less comprehensive submissions than are currently before the Tribunal. The Tribunal did not find the reports of any of those inquiries to be compelling or determinative of the issues before it.

11. The requests by RCB veterans for 'warlike' recognition have also been considered on multiple occasions by internal reviews within the Department of Defence (Defence) and subsequent ministerial decisions have been based on departmental advice. The Tribunal did not consider the analysis behind those decisions and the underlying advice to be either adequate or compelling.

12. Neither the Australian Active Service Medal Regulations nor the VEA contain any definition of the characteristics that service should possess in order to be 'warlike'. Similarly, relevant legislation contains no definition of the characteristics that should be possessed by service if it is to be classified by the alternatives of 'non-warlike' service or 'peacetime' service.

13. However, in 1993 the Cabinet did agree to definitions of 'warlike' and 'non-warlike' that were to uniformly govern each of conditions of service (such as leave and allowances), veterans' entitlements and medallic recognition. While not containing a definition of what was referred to as 'normal peacetime service', the decision clearly recognised 'peacetime' as a classification separate to and distinct from 'warlike' and 'non-warlike'. There is nothing in the Cabinet Decision that expressly states that these definitions and classifications were to apply only in respect of service after the date of the decision. While the Cabinet Submission to which that decision responded did state that the proposed definitions should apply to conditions of service for future overseas ADF deployments, it contained no such qualification in respect of veterans' entitlements or medallic recognition. Given that conditions of service had already been determined for past deployments by the cumbersome process that was to be replaced by the more-timely process proposed by that Submission and agreed by Cabinet, that distinction was understandable. When VEA amendments to incorporate definitions of 'warlike service' and 'non-warlike service' were made in 1997 as required by the 1993 Cabinet Decision, they contained no limitation as to the time of the service to which they could be applied.

14. In 2018, the Minister for Defence approved 'updated' definitions of 'warlike' and 'non-warlike' and added a new definition of 'peacetime' service. However, the submission approved by the Minister stated that the new definitions should only apply to conditions of service and veterans' entitlements for future ADF service, and thus not to medallic recognition for any service.

15. Given that the Tribunal has been made aware of no definitions of 'warlike', 'non-warlike' or 'peacetime' service prior to 1993 and that there has subsequently been no properly informed Government or Ministerial to change the 1993 definitions as they applied to service prior to 2018, it considered that the 1993 definitions should be applied in its deliberations in the current inquiry. At the same time, even though they are strictly inapplicable, the Tribunal had regard to the 2018 definitions for the limited purpose of seeing if they would suggest any alternative outcome.

16. In its submission to the inquiry, Defence stated that the award of an Australian Service Medal provides *appropriate recognition* of RCB service and that such service is *appropriately classified* as 'peacetime' service. The Tribunal believed these statements are irreconcilably in conflict with one another.

17. An Australian Service Medal is awarded for 'non-warlike' service and cannot be awarded for 'peacetime' service.

18. Defence argued that there are three classifications of service for Nature of Service (NOS) purposes ('warlike', 'non-warlike' and 'peacetime') but only two classifications ('warlike' and 'non-warlike') for the purposes of medallic recognition and that accordingly, in the context of medallic recognition, 'non-warlike' meant 'other than warlike' and covered both the 'non-warlike' and 'peacetime' NOS classifications.

19. In the view of the Tribunal, the introduction of such a dichotomy would have been both illogical and anomalous. More importantly, the Tribunal considered that those arguments by Defence were untenable. The 1993 Cabinet Decision clearly recognised three separate classifications of service - 'warlike', 'non-warlike' and 'peacetime' - that were to determine each of conditions of service, veterans' entitlements under the VEA, and medallic recognition. There has since been no later Cabinet decision or other properly informed Government decision that has changed that position. While Defence suggested that a 2001 ministerial decision had that effect, it was clear on close analysis that it did not do so.

20. In its submission to the current inquiry, Defence also stated that *Defence and successive Australian Governments have consistently held that ADF service at Butterworth between 1970 and 1989, and since that time, is appropriately classified as peacetime service*. This statement was factually incorrect, given that:

a. on 21 March 2000 Cabinet agreed that service including RCB service up to 30 October 1971 should be declared a 'non-warlike operation';[1]

b. on 19 July 2000 Defence recommended to the Minister Assisting the Minister for Defence that the Minister should recommend to the Governor-General that RCB service from 30 October 1971 to 1975 should be declared a 'non-warlike operation';[2]

c. on 23 March 2001 the Governor-General, on the recommendation of the Minister, declared service including RCB service up to 30 October 1971 to be

[1] Cabinet Decision, JH00/0088/CAB, *Review of Service Entitlement Anomalies in Respect of South East Asian Service 1955-1975*, Submission 96b, Department of Defence.
[2] Submission 96a, Department of Defence.

a ‘non-warlike operation’;[3]

d. on 10 April 2001 Defence recommended to the Minister that the Minister should recommend to the Governor-General that RCB service from 30 October 1971 to 1989 should be declared a ‘non-warlike operation’; [4]

e. on 18 April 2001 the Minister recommended to the Governor-General that RCB service from 1971 to 1989 should be declared a ‘non-warlike operation’;[5]

f. on 8 June 2001 the Governor-General declared that RCB service from 1971 to 1989 was a ‘non-warlike operation’;[6]

g. on 28 August 2007 Defence recommended to the Minister for Veterans’ Affairs, the Hon Bruce Billson, that RCB service should be determined to be ‘non-warlike service’ or ‘hazardous service’ (a subset of ‘non warlike service’ under the definitions agreed by Cabinet in 1993) for the purposes of the VEA;[7] and

h. on 18 September 2007 Minister Billson, for the Minister for Defence, determined RCB service from 15 November 1970 to 31 December 1989 to be either ‘non-warlike service’ or ‘hazardous service’ for the purposes of the VEA.[8]

21. Defence asserted on many occasions that RCB service was ‘peacetime’ because RCB veterans were not ‘allotted for special duty’ under the *Repatriation (Special Overseas Service) Act 1962* (the Repatriation (SOS) Act) and could not be retrospectively so allotted because Cabinet, by Decision 1048 of 7 July 1965, had decided that allotment should only occur where there had been *a specific request for the assistance of Australian forces* by the foreign country in which service is performed.

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[3] *Declaration and Determination under the Australian Service Medal 1945-1975 Regulations*, Commonwealth of Australia Gazette No. S102, dated 27 March 2001.

[4] Submission 96a, Department of Defence.

[5] Submission 96a, Department of Defence, p. 4.

[6] *Declaration and Determination under the Australian Service Medal Regulations*, Commonwealth of Australia Gazette No S230 dated 29 June 2001.

[7] Ministerial Brief Vice Chief of the Defence Force to Minister Billson Ref B660823 dated 28 August 2007, included with Submission 96a, pp. 14-15.

[8] Ministerial Determination of Hazardous Service and Non-Warlike Service *Veterans’ Entitlements Act 1986*, dated 18 September 2007. Document number 150.

22. The Tribunal concluded that these assertions were untenable on multiple bases:

a. if a specific request from Malaysia was in fact a requirement for allotment, it is at least arguable that such a request was made constructively if not overtly;

b. regardless, on a plain English reading, Cabinet Decision 1048 did not state that allotment should only occur where there has been such a request;

c. such a requirement should not be implied into the Cabinet decision because to do so would result in a situation where Australian troops serving overseas against a hostile force by unilateral Australian decision would be denied the favourable entitlements that would be afforded to those serving in an equally hostile environment at the request of another country. Such an illogical policy outcome could not reasonably have been intended either by Cabinet or by the senior inter-departmental committee whose report was considered and approved by Cabinet; and

d. more fundamentally, the Repatriation (SOS) Act was and is irrelevant and not determinative of the nature of RCB service for multiple reasons:

i. nature of service does not derive from veterans' entitlements legislation. Rather, as reflected in the 1993 Cabinet decision, veterans' entitlements are granted once the nature of service is identified;

ii. 'allotted for special duty' was not a service classification under the Repatriation (SOS) Act. The service classification to which that Act applied was 'warlike operations or state of disturbance'. Allotment was simply a bureaucratic or administrative process for identifying those Defence Force members or units that performed service associated with the 'warlike operations or state of disturbance' and were thus to receive repatriation benefits. The question of allotment under the Repatriation (SOS) Act only arose when the nature of service was determined to be 'warlike operations or a state of disturbance'; and

iii. RCB veterans were never seeking benefits under the Repatriation (SOS) Act (which had been repealed by the VEA in 1986 and thereafter had no ongoing operation) but instead sought recognition of their service as 'warlike' under Regulations governing the Australian Active Service Medals and under the VEA. Allotment was not then, and is not now, a relevant eligibility criterion under either those Regulations or the VEA. The irrelevance of the Repatriation (SOS)

> Act is highlighted when it is realised that, if it was concluded that RCB veterans should have been allotted under the Repatriation (SOS) Act, retrospective allotment could not provide the repatriation benefits they would have received had that error not been made. That is because, after the Repatriation (SOS) Act was repealed in 1986, such benefits could only be provided if the quite different terms of the VEA were met.

23. The proper question that should have then been asked and that should now be asked is whether or not RCB service was 'warlike', 'non-warlike' or 'peacetime' service. This is not a binary distinction. A conclusion that service was not 'warlike' does not mean that it was 'peacetime'. A conclusion that service was not 'peacetime' does not mean that it was 'warlike'. In either situation, the alternative classification of 'non-warlike' demands consideration.

24. Based on the detailed analysis in Chapter 7, the Tribunal concluded that the 1993 Cabinet-approved definitions of 'non-warlike' and 'warlike' remain extant as the current and best available statement of informed government policy and thus should be adopted by the Tribunal in ascertaining the proper classification of RCB service.

25. Notwithstanding Defence submissions to the contrary, following careful consideration of all of the submissions and material before it (including numerous assertions of fact from RCB veterans about their service which were not contested by Defence), the Tribunal concluded that:

a. having regard to the analysis in Chapter 17, RCB service clearly met, at least, the definition of 'non-warlike' approved by Cabinet in 1993 (and would equally meet the 2018 definition of that term); and

b. because it was a military activity where there was an associated risk and casualties were a possibility, having regard to the analysis in Chapter 16, RCB service clearly was not 'peacetime service' as that term was defined by implication by the Cabinet in 1993 (or expressly defined by the Defence Minister in 2018).

26. The question before the Tribunal was thus whether RCB service was more than 'non-warlike' and should now be recognised as 'warlike' under the 1993 Cabinet definition of that term (or having regard to the 2018 ministerial update of that definition).

27. To answer that question, it was necessary to identify relevant factual circumstances of RCB service and to correlate those facts to the wording of the various definitions. It was not sufficient to have regard only to historic records of the purpose of and planning for RCB service, especially when it is now recognised that, for the purposes of 'diplomatic nicety' or

'political expedience', some of those records deliberately failed to disclose the true and intended purpose and nature of RCB service.

28. The Tribunal received in excess of 240 written submissions from over 140 RCB or RAAF veterans who were 'on the ground' during one or more deployments on RCB service. They made numerous and frequently consistent assertions of fact about RCB service. The Tribunal asked Defence to indicate which of those assertions it challenged as factually incorrect and, because its submission to this inquiry and previous internal reviews did not do so, to then provide a detailed analysis of the uncontested facts against each of the 1993 and 2018 definitions (Defence's analysis is attached at Appendix 6).

29. With only minor and essentially irrelevant exceptions, Defence did not challenge the factual assertions made by RCB and RAAF veterans in their submissions to the Tribunal. It did not ask that any RCB veterans be called to give evidence on oath or affirmation, or to be subject to cross-examination. Notwithstanding, RCB veteran representative organisations did call a number of witnesses to give evidence at Tribunal hearings and Defence had the opportunity to ask questions of them or challenge the evidence they gave. Similarly, both Defence and RCB representative organisations had the opportunity to question or challenge the evidence of the one expert witness called by the Tribunal in relation to the Rules of Engagement (ROE) issued for RCB service.

30. Defence did not assert that any of the uncontested facts was consistent only with a classification of RCB service as 'peacetime'. At the same time, RCB veteran representative organisations presented no argument that satisfied the Tribunal that the facts on which they relied were consistent only with a classification of RCB service as 'warlike'.

31. Accordingly, the Tribunal examined all the uncontested evidence by reference to the 1993 Cabinet-approved definitions. It also considered whether the 2018 definitions, if they had been applicable, would have led to any different conclusion. It found that many of the uncontested facts clearly supported the conclusion that RCB service was not 'peacetime' but did not go further than that to demonstrate whether RCB service was 'warlike' rather than 'non-warlike'. Having regard to the analysis in Chapter 18, the Tribunal further found that all of the other features of RCB service evidenced by the uncontested facts were consistent with RCB service being either 'non-warlike' or 'warlike' and that none were conclusive of RCB service being 'warlike'.

32. The Tribunal considered that the Defence analyses by reference to the 1993 definition of 'non-warlike' and the 2018 definitions of 'peacetime' and 'non-warlike' were plainly unsustainable, and that the Defence analyses by reference to the 1993 and 2018 definitions of 'warlike' were not convincing.

33. It was thus necessary for the Tribunal to reach a conclusion as to whether RCB service was 'non-warlike' or 'warlike'. By reference to the 1993 definitions, the Tribunal's assessment came down to whether or not RCB service involved more than a possibility of casualties and entailed sufficient risk to give rise to an expectation of casualties. The Tribunal came to a clear view, detailed in Chapter 18, that RCB service, while of strategic importance and not without hazard, was not 'warlike'. This was because, notwithstanding the tireless efforts of RCB representative organisations and the many and varied arguments they and others presented, the Tribunal concluded that RCB service did not carry with it the requisite level of risk to give rise to an expectation of casualties as specified by the definition of 'warlike' service (either as set out in 1993 or as updated in 2018).

34. The Tribunal found that, while the New Zealand reassessment of medallic recognition of that country's own defence personnel who served at ABB may have provided a motivation for commissioning the present Tribunal inquiry, the outcome of that reassessment did not provide any reason to come to a different conclusion. In effect, as discussed in Chapter 10, the reassessment effectively aligned New Zealand medallic recognition with the equivalent of an Australian Service Medal.

35. This means that RCB service is appropriately recognised by award of an Australian Service Medal and does not meet the eligibility criteria for an Australian Active Service Medal.

36. However, it also means that RCB service should now be formally recognised as being 'non-warlike' service under the VEA. This would be consistent with the 2007 Ministerial decision supported at that time by Defence but not then implemented by Defence on behalf of the then Minister as statutorily required. The Tribunal recommends that this should be done as quickly as practicable.

37. The Tribunal further concluded that RCB service does not qualify for the various other forms of medallic recognition sought by RCB veterans.

38. The Tribunal has also made a number of other consequential or systemic recommendations. These relate to consideration of medallic and VEA recognition of RAAF personnel who performed similar functions to RCB veterans at ABB, and to reconsideration of administrative structures and definitions to avoid the possibility of the protracted and disjointed processes that have delayed the resolution of classification of RCB service for so much longer than should have been necessary.

Chapter 1 Terms of Reference

1.1 On 7 April 2022 the then Minister for Veterans' Affairs and Defence Personnel, the Hon Andrew Gee MP, issued the following direction to the Tribunal:

> *The Defence Honours and Awards Appeals Tribunal (the Tribunal) is directed to inquire into issues pertaining to medallic recognition for service with Rifle Company Butterworth.*
>
> *Specifically, the Tribunal is to have regard to the New Zealand Government's recent decision to extend eligibility for the New Zealand Operational Service Medal to a larger proportion of members of the New Zealand Armed Forces who served in Malaysia and Singapore between 1959 and 1974. The Tribunal is to consider whether this decision should bring about any change to Australian medallic recognition for service with Rifle Company Butterworth between 1970 and 1989, including whether that service should be recognised with an Australian Active Service Medal.*
>
> *The Tribunal is to determine its own procedures, in accordance with the general principles of procedural fairness, when conducting this inquiry as set out in these Terms of Reference. In this regard, the Tribunal may conduct its own research, interview such persons as it considers appropriate and consider material that is relevant to these Terms of Reference.*
>
> *The Tribunal is to report in writing, to the Minister for Defence Personnel on the findings and recommendations that arise from this inquiry.*
>
> *In making its findings and recommendations, the Tribunal is to have regard to the integrity of the Australian honours system and identify any consequential impact or make any finding or recommendation upon that system.*
>
> *Submissions to the Tribunal close on 1 July 2022.*

1.2 An accompanying ministerial press release said:

> *The independent Defence Honours and Awards Appeals Tribunal will re-examine the issue of medallic recognition for Australians who served with Rifle Company Butterworth in Malaysia between 1970 and 1989.*
>
> *Minister for Veterans' Affairs and Defence Personnel Andrew Gee said the Government had listened to the concerns raised by many veterans who had served on Rifle Company Butterworth deployments.*
>
> *"The Tribunal will consider whether these Australian veterans should receive the Australian Active Service Medal for their deployment to Malaysia," Minister Gee said*

"The issue was looked at by the Tribunal more than a decade ago, and a view was taken at the time not to recognise their service as "warlike".

"The New Zealand Government recently broadened eligibility for the New Zealand Operational Service Medal for veterans who served in Malaysia and Singapore between 1959 and 1974. Given this, and the concerns raised directly with me by the veteran community, it is timely that this issue is re-examined.

...

"I also acknowledge that veterans who have served on Rifle Company Butterworth deployments have been fighting for this additional recognition for years, and I don't want this to drag on. I expect the inquiry to be complete by the end of the year.

"This will be a public inquiry and I encourage all those with an interest to make a submission before 1 July 2022."

Australian Defence Force personnel have served continuously at the Royal Malaysian Air Force Base Butterworth in Malaysia since 1970, when Rifle Company Butterworth was deployed at a time of unrest in Malaysia, led by the Malayan Communist Party (MCP). The MCP signed a peace treaty with the Government of Malaysia in 1989.[9]

[9] Media Release, *Independent Tribunal to reconsider medallic recognition for Rifle Company Butterworth*, The Hon Andrew Gee MP, dated 7 April 2022.

Chapter 2 Interpreting the Terms of Reference

2.1 Section 110W of the *Defence Act 1903* (the Act) allows the Minister to direct the Tribunal to hold an inquiry into *a specified matter concerning honours or awards for eligible service*.

2.2 Individual RCB veterans and the organisations representing them argued, in their submissions to the Tribunal, that RCB service should be classified as 'warlike'. In doing so, they sought not only conferral of an Australian Active Service Medal and other forms of medallic or badge recognition, but also declaration of RCB service as 'qualifying service' under the VEA.

2.3 A threshold question for the Tribunal was therefore whether or not the Tribunal was confined to considering only the first of these issues – whether RCB service met the eligibility criteria for award of an Australian Active Service Medal and other Defence recognition – or whether it could also consider the issue of whether RCB service could be declared to be qualifying service under the VEA.

2.4 Section 110W would not, in the Tribunal's view, allow the Minister to direct the Tribunal to inquiry into that latter issue alone.

2.5 However, if there was a sufficient nexus between medallic eligibility and qualifying service, then it would seem that the Tribunal could consider the latter issue if directed to inquire into the former.

2.6 The Terms of Reference directed the Tribunal to inquire into *issues pertaining to medallic recognition for service with Rifle Company Butterworth*.

2.7 As will appear later in this report, in 1993 Cabinet decided that common definitions of 'warlike' and 'non-warlike' should apply for three different purposes – determining conditions of ADF service such as leave and allowances, eligibility under the VEA, and medallic recognition. As explained in the detailed analysis in Chapter 7, there has been no subsequent Cabinet decision or properly informed Ministerial decision to change that position.

2.8 Accordingly, a conclusion that service was 'warlike' would, on that basis, pertain to and concern each of conditions of service, VEA eligibility and medallic recognition.

2.9 But, even if that is not correct, section 110W of the Act expressly provides that, in an inquiry report to the Minister, the Tribunal *may include any recommendations that the Tribunal considers appropriate and that arise out of, or relate to, the inquiry*.

2.10 For these reasons, the Tribunal proceeded on the basis that it is legally permissible for it to consider not only whether RCB service met the eligibility criteria for award of an Australian Active Service Medal and other forms of Defence recognition but also whether RCB service could and should be declared to be qualifying service under the VEA.

2.11 Moreover, beyond being legally permissible, the Tribunal considered that it would be pragmatically desirable for it to consider both issues. RCB veterans and their representative organisations have been consistently and persistently pressing both issues for decades. It is highly desirable that the Government now be able to take decisions that put this controversy to rest once and for all. That will only be possible if both issues, along with any implication of the recent New Zealand reclassification of similar service, are now thoroughly considered.

Chapter 3 Conduct of the Inquiry

3.1 Following issue of the Minister's direction and terms of reference, the Chair of the Tribunal, Mr Stephen Skehill, allocated responsibility for the conduct of the inquiry to a panel comprising of Rear Admiral Allan Du Toit AM RAN (Retd), Air Commodore Anthony Grady AM (Retd) and himself. None of the panel had any previous material connection with RCB service and, importantly, none of the panel was a member of the Tribunal while it conducted an earlier ministerially-directed inquiry into the same subject matter between 2010 and 2011.

3.2 Because that earlier Tribunal inquiry had rejected the arguments put to it that RCB service was 'warlike', the panel made clear to all parties that it came to this inquiry with an open mind, free of any pre-conceptions. While it was of course bound to give consideration to the reports and findings of all the previous inquiries and reviews, including the previous Tribunal inquiry, it made no presumption about whether any of them had reached the right conclusion. It assured the parties that this report, when provided to the Minister, would be based squarely on all the evidence before it (which was significantly more than was before any of the previous reviews and inquiries) and on its independent assessment and analysis of that evidence. The panel had no hesitation in coming to contrary conclusions to those reached previously by any other body, including the earlier Tribunal panel.

3.3 The Tribunal placed advertisements seeking submissions in the national press and online on 23 April 2022.

3.4 The Tribunal received 269 submissions from 151 individuals and organisations, as listed at Appendix 1.

3.5 The Tribunal held meetings with interested parties and public hearings as listed in Appendix 2.

3.6 As is apparent from the chronology set out in Chapter 7, the issue of recognition for RCB service has been the subject of numerous reviews and inquiries over an extended period, both internal to the Department of Defence and independent of that Department. None of those reviews and inquiries found RCB service to be 'warlike', as it was consistently claimed to be over many years by those representing RCB veterans.

3.7 Because the subject of recognition for RCB service has been the subject of contention for so many years, it is in everyone's best interest that well researched, final and sustainable decisions can now be taken by Government. Whether or not those decisions find in favour of what is sought by those contesting present recognition and seeking greater recognition, it is in the best interests of RCB veterans, it is in the best interests of the ADF and the Department of Defence and it is in the best interest of the Government that the issue of RCB recognition be now resolved once and for all.

3.8 To that end, the Tribunal went to considerable lengths to ensure that it did all that was reasonably possible to allow final decisions to now be made by the Government on a sound basis. Integral to that was the necessity for all interested parties to have the fullest opportunity to put informed views to the Tribunal and to know of and comment on any contrary view.

3.9 Accordingly, rather than proceeding directly to hearings following the initially announced closing period for lodgement of submissions, the Tribunal took the following actions:

a. it identified a detailed list of the issues that it seemed to it were raised by the terms of reference and the submissions received;

b. it provided that list to the RCB representative bodies and Defence so that they could give consideration to those issues and be prepared to discuss them at hearing;

c. it published on its website all the submissions it received where it had consent to do so, so that all interested parties not only knew what had been said but also had an opportunity to lodge further or revised submissions, which a number of parties did;

d. it held a preliminary meeting with the RCB representative bodies and Defence to discuss how and when the hearings should best be held and whether there was more that it could do to ensure the effectiveness of the hearing process;

e. at the preliminary meeting the Tribunal gave a clear undertaking that it would not engage in discussion of the issues raised in this inquiry with any party outside the confines of a hearing attended by or accessible to each other party or their representative;

f. after the preliminary meeting, it provided the RCB representative bodies and Defence with a proposed agenda indicating the order in which it intended to address key issues during the initial hearing;

g. it distributed to the RCB representative bodies and Defence the results of the research undertaken by the Tribunal's own staff – while much of that material was or should have been already known to those parties, there may have been some new material there that each party should have the right to see;

h. it held a preliminary meeting with officers of the Department of Veterans' Affairs to double-check its own understanding of the enormous complexities of the veterans' entitlements legislation and invited representatives of that Department to attend the first hearing of the inquiry in the hope that all parties could reach a common understanding on those matters;

i. it arranged for the hearings, when held, to be livestreamed so that interested parties had a further opportunity to know what was being said about their service and to lodge further submissions if they so wished, which a number of parties did;

j. it decided that there would be a break between the first day of hearings and subsequent hearings so that there could be a period for reflection on what was discussed on that first occasion, and so that no one was rushed in considering what more needed to be said;

k. it prepared a hearing resource pack which brought together extracts of various documents that it believed would be key to the matters under discussion at the first hearing;

l. it provided an agenda itemising the issues to be considered at subsequent hearings;

m. it agreed to requests by RCB representative organisations that they be allowed to call witnesses in support of their case notwithstanding that Defence had indicated that it did not contest material questions of fact contained in the submissions to the inquiry and did not seek an opportunity to question or cross-examine any submitter;

n. it called an expert witness in relation to the ROE issued to RCB and allowed all parties to question that witness and make submissions in relation to the evidence that witness gave;

o. it extended the period for receipt of written submissions to 15 May 2023 (and did not reject any of the very few submissions that were in fact received beyond that date);

p. at hearings it allowed questions and comments from all those in attendance and not just those nominated to represent a party; and

q. it sought to conduct its hearings in as informal and conversational a manner as was possible, consistent with a proper examination of all relevant matters.

3.10. In this report, the Tribunal has included footnotes to cross-reference material in support of statements made in the text. In these footnotes the Tribunal has referred to publicly available sources such as Acts and Regulations, to submissions made to the inquiry, which are referred to by the Submission number published on the inquiry website, and to other documents that were shared with RCB representative organisations and Defence, which are referred to in footnotes by Document number. Documents in this latter category are available from the Tribunal Secretariat on request. The report also makes reference to a small number of other documents which were provided to the Tribunal subject to a restriction on publication (for example to protect the privacy of individuals). The Tribunal considered it not to be necessary to seek lifting of such restrictions as the documents in question were of no material relevance beyond that stated in the report. Finally, the report also refers to a small number of other documents that were not shared with RCB representative organisations but which also had no material relevance beyond that stated in the report.

Chapter 4 Current recognition of Rifle Company Butterworth service

4.1 RCB veterans have had their RCB service recognised by being awarded either:

a. the Australian Service Medal 1945-1975 (ASM 1945-1975) for service at Air Base Butterworth (ABB) between 15 November 1970 and 13 February 1975; or

b. the Australian Service Medal (ASM) for service at ABB up to 31 December 1989.

4.2 The ASM was created by Letters Patent on 13 September 1988. The accompanying Regulations provide that the Governor-General on the recommendation of the Minister may declare a non-warlike operation in which members of the ADF are or have been engaged on or after 14 February 1975 to be a prescribed operation and that thereafter the medal may be awarded by the Governor-General on the recommendation of the Chief of the Defence Force (CDF) or his delegate for service in or in connection with a prescribed operation.[10]

a. On 8 June 2001 the Governor-General relevantly declared, as a prescribed operation for the purposes of the ASM, Defence Force activities on land in Malaysia between 14 February 1975 and 31 December 1989, being non-warlike operations in which members of the ADF were engaged, including with Australian Rifle Company Butterworth.[11]

b. On 20 February 2002 the Governor-General made a new declaration which relevantly was to the same effect as that of 8 June 2001.[12]

4.3 The ASM 1945-1975 was created by Letters Patent on 22 February 1995. The accompanying Regulations provide that the Governor-General on the recommendation of the Minister may declare a non-warlike operation in which members of the ADF were engaged at any time between 3 September 1945 and 16 September 1975 to be a declared operation and that thereafter the medal may be awarded by the Governor-General on the recommendation of the CDF or his or her delegate for service in connection with a declared operation.[13]

a. On 23 March 2001 the Governor-General declared Defence force activities on land in Malaysia, except those warlike operations prescribed from time to time

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[10] *Letters Patent and Regulations for the Australian Service Medal*, dated 13 September 1988, *Commonwealth of Australia Gazette No. S336*, dated 2 November 1988. Document number 145.

[11] *Declaration and Determination under the Australian Service Medal Regulations, with Clasp 'SE ASIA'* dated 8 June 2001, *Commonwealth of Australia Gazette No. S230* dated 29 June 2001.

[12] *Declaration and Determination under the Australian Service Medal Regulations, with Clasp 'SE ASIA'* dated 20 February 2002. *Commonwealth of Australia Gazette No. S64* dated 28 February 2002. Document number 148.

[13] *Regulations Governing the Award of the Australian Service Medal 1945-1975*, dated 8 June 2001. *Commonwealth of Australia Gazette No. S230* dated 29 June 2001.

by the Governor-General that occurred on the Thailand-Malaysia border, that commenced on 12 August 1966 and ended on 31 October 1971 to be a non-warlike operation under the ASM 1945-1975 Regulations.[14]

b. On 8 June 2001 the Governor-General declared as a prescribed operation for the purposes of the ASM 1945-1975 Defence Force operations on land in Malaysia between 12 August 1966 and 14 March 1975, being non-warlike operations in which members of the ADF were engaged with elements of the South East Asia Treaty Organisation; the Australia, New Zealand the United States (Pacific Security) Treaty; the Far East Strategic Reserve; the United Nations; the Australia, New Zealand and United Kingdom (ANZUK); Five Power Defence Arrangement; and Australian Army Survey Operations in South East Asia.[15]

4.4 On 18 September 2007 the Minister for Veterans' Affairs, the Hon Bruce Billson MP, acting for the Minister for Defence, made two determinations under the *Veterans Entitlements Act 1986* (the VEA) that:

a. RCB service from 15 November 1970 to 6 December 1972 was 'non-warlike service'; and

b. RCB service from 6 December 1972 to 31 December 1989 was 'hazardous service'. [16]

4.5 Under the *Legislation Act 2003*, those ministerial determinations could only come into effect on the day after they were registered on the Federal Register of Legislation.[17] For reasons and with consequences discussed later in this report, those determinations were never registered as required by that Act and thus did not come into effect.

4.6 As a result, RCB veterans currently have no enhanced entitlements under the VEA. This means that any claims they make under that Act for compensation for RCB service-related disability are required to be decided on the balance of probabilities rather than on the more favourable reasonable hypothesis/reverse criminal onus test intended by Minister Billson.

[14] *Regulations Governing the Award of the Australian Service Medal 1945-1975*, dated 23 March 2001. *Commonwealth of Australia Gazette No. S102*, dated 27 March 2001.
[15] *Declaration and Determination under the Australian Service Medal 1945-1975 Regulations*, dated 8 June 2001. *Commonwealth of Australia Gazette No. S230*, dated 29 June 2001. Document number 147.
[16] Submission 96a, Department of Defence, Attachment B.
[17] *Legislation Act No 139 of 2003,* Section 12(1).

Chapter 5 Recognition of RCB Service sought by Rifle Company Butterworth Veterans

5.1 RCB veterans and the organisations representing them have been pressing for additional recognition for many years – from at least 1993 in submissions to the Committee Inquiry into Defence Awards (CIDA).

5.2 They have consistently and persistently argued that RCB service was and should be recognised by the Australian Government as 'warlike'.

5.3 More specifically, RCB veterans have been seeking:

a. declaration of their service as a 'warlike operation', which would allow them to be awarded an Australian Active Service Medal; and

b. determination of their service as 'warlike service', which would allow them to receive the most generous entitlements available under the VEA.

5.4 They have also sought:

a. award of the Imperial General Service Medal 1962 for service prior to 14 February 1975;

b. that the Malaysian Government extend the qualifying period for the Pingat Jasa Malaysia (PJM) to recognise RCB service from 1970 to 1989; and

c. award of the Returned from Active Service Badge.[18]

5.5 The Australian Active Service Medals that recognise service on 'warlike' operations rank higher in precedence to the Australian Service Medals that recognise service on 'non-warlike' operations.

5.6 The AASM was created by Letters Patent on 13 September 1988. The accompanying Regulations provide that the Governor-General on the recommendation of the Minister may declare a warlike operation in which members of the ADF are or have been engaged on or after 14 February 1975 to be a prescribed operation and that thereafter the medal may be awarded by the Governor-General on the recommendation of the CDF or his delegate for service in or in connection with a prescribed operation.[19]

5.7 The AASM 1945-1975 was created by Letters Patent on 11 December 1997. The accompanying Regulations provide that the Governor-General on the recommendation of the Minister may declare a warlike operation in which members of the ADF were engaged at any time between 3 September 1945 and 13 February 1975 to be a prescribed operation and that thereafter the medal may be awarded by the Governor-General on the recommendation of the

[18] Submission 79b, Mr Stanley Hannaford obo Rifle Company Butterworth Veterans' Group 1970 – 1989.
[19] *Letters Patent and Regulations Governing the Award of the Australian Active Service Medal Regulations*, *Commonwealth of Australia Gazette No. S335*, dated 2 November 1988. Document number 143.

CDF or his or her delegate for service in connection with a prescribed operation.[20]

5.8 So far as veterans' entitlements are concerned, in essence the VEA creates three tiers of entitlement:

a. on the base tier, veterans can receive compensation for service-related disability, provided that the relationship to service is established on the usual civil standard of the balance of probabilities;

b. on the intermediate tier, veterans can similarly receive compensation for service-related disability, but the relationship to service is established on a more favourable basis than the balance of probabilities – if there is a reasonable hypothesis to link disability to service, then compensation must be granted unless the Repatriation Commission is satisfied beyond reasonable doubt that disability was not caused by service (that is, a reverse criminal onus); and

c. on the top tier, in addition to veterans receiving compensation determined on that more favourable basis, a service pension is also paid and eligibility exists for the Gold Card.

5.9 To qualify for the top tier of veterans' entitlements sought by RCB veterans, they must have 'qualifying service' under section 7A of the VEA. That section lists various categories of qualifying service, each of which has different criteria. However, under the VEA as it stands, RCB veterans can only satisfy the requirement for qualifying service if they meet the criterion in section 7A(1)(iv) – that is, if they have 'rendered warlike service'. Section 5C of the Act defines 'warlike service' as *service in the Defence Force of a kind determined in writing by the Defence Minister to be warlike service*.

5.10 Declarations of 'warlike operation' made by the Governor-General for the purposes of the AASM and AASM 1945-1975 Regulations allow the award of the AASM or the AASM 1945-1975, but they are not the same as the determinations of 'warlike service' made by the Defence Minister under the VEA which are necessary for the beneficial entitlements that are sought by RCB veterans. Those entitlements only arise when and if a separate declaration is made under the VEA.

5.11 There is in the legislation no reason why, if a declaration is made under the Regulations, a determination must necessarily be made under the VEA. Conversely, there is in the legislation no reason why, if a determination is made under the VEA, a declaration must necessarily be made under the Regulations.

5.12 However, given that both the Regulations and the VEA use the descriptor 'warlike', it seemed to the Tribunal that there would need to be strong reasons why different criteria would apply under the Regulations and the VEA. Whether such reasons exist was thus a key issue

[20] *Letters Patent and Regulations Governing the Award of the Australian Service Medal 1945-1975*, *Commonwealth of Australia Gazette No. S18*, dated 19 January 1998. Document number 144.

for the Tribunal, and is dealt with in detail in Chapter 7.

5.13 Neither the Regulations nor the VEA provide any substantive definition of 'warlike', simply leaving this as a matter for ministerial consideration. How the term 'warlike' is or should be defined was therefore also a key issue for the Tribunal in deciding what recommendation it should make to the Minister as a result of this inquiry. The issue of definition is considered in detail in Chapters 7, 16, 17 and 18.

Chapter 6 The Australian Defence Force in Malaysia

Recent regional history

6.1 Before the arrival of Europeans - Portuguese, Dutch and British - the Malayan region comprised a number of Malay kingdoms on both the Malayan peninsula and the islands of present-day Indonesia. While Dutch hegemony was established among the islands, the British established and consolidated their influence on the peninsula, and in the 18th century the Malay kingdoms and the British Strait settlements protectorate became part of the British Empire.[21]

6.2 During the Second World War, Malaya, North Borneo, Sarawak and Singapore were invaded and occupied by the Imperial Japanese Army. After the Japanese Army withdrew at the end of the War and Britain regained its control, the Malayan Peninsula was unified as the Malayan Union in 1946 and reconstituted as the Federation of Malaya in 1948 before achieving independence in 1957. Independent Malaya united with the then British crown colonies of North Borneo, Sarawak and Singapore to become Malaysia in 1963. Singapore was expelled from the federation and became a separate independent country in 1965.

6.3 From the end of the Second World War, communism presented the only real and pressing threat to South-East Asia. To meet the threat, Australia developed a policy of forward defence and, in 1946, the Australia-New Zealand-Malaya (ANZAM) area arrangements were agreed to provide a *forum for consultation on defence issues*.[22]

6.4 In 1948 the British colonial authorities in Malaya declared a state of emergency in order to combat a wave of violence and unrest which arose from a background of considerable political, racial and industrial conflict. For the next 12 years British, Malayan and Commonwealth forces fought against an insurgency led by the Malayan Communist Party (MCP). The state of emergency, which became generally known as the Malayan Emergency, was not fully lifted until 1960, by which time the Federation of Malaya had been independent for three years. [23]

6.5 Following the signing of the Korean Armistice Agreement in 1953, the British Chiefs of Staff considered the establishment of a standing Commonwealth Strategic Reserve to relieve the pressure on their hard pressed and thinly spread force. This concept was soon termed the Far East Strategic Reserve (FESR) and was intended to provide forces for the defence of Malaya and Singapore and their adjacent waters. These would be stationed in Malaya to be ready to respond at a moment's notice. [24]

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[21] Peter Edwards, *Crises and Commitments: the politics and diplomacy of Australia's involvement in Southeast Asian conflicts 1948-1965*, Sydney: Allen & Unwin, 1992, p. 21.
[22] Mark Lax, *Malayan Emergency and Indonesian Confrontation: 1950-1966*, Newport: Big Sky Publishing, 2021, p.46.
[23] *Crises and Commitments*, p. 21.
[24] *Malayan Emergency and Indonesian Confrontation,* p 47.

6.6 The FESR's primary role was *the defence of Malaya against external communist aggression* with a secondary role *to assist in the maintenance of the security of the Federation of Malaya by participating in operations against the Communist Terrorists*.[25] Under the Australian commitment to the FESR, the RAAF was required to provide three front-line squadrons at Butterworth and RAN units were assigned to a British carrier group. Australia later committed ground forces to the Malayan Emergency in October 1955.

6.7 After Malaya gained independence in 1957, the British and Malayan Governments signed the Anglo-Malayan Defence Agreement (AMDA) under which British forces would remain in the country after independence as a security umbrella for the newly formed nation. Australia and New Zealand were invited to contribute in a reserve capacity to AMDA from 1959, but this did not commit either nation to defend Malaya in the event of an external attack.

6.8 During the Malayan Emergency, ethnic Chinese rebels under the leadership of the MCP, who had waged a guerrilla war against the occupying Japanese during the Second World War, initially launched guerrilla operations designed to force the British out of Malaya and establish a communist state. Infantry forces of the FESR operated against the Malayan National Liberation Army which had been formed by the leader of the MCP, Chin Peng. During the Malayan Emergency, 1,348 Malayan, 519 British, 39 Australian and 15 New Zealand military and police members were killed.

6.9 The end of the Malayan Emergency in July 1960 did not bring with it a reduction or withdrawal of the Commonwealth forces allotted to the FESR. While the successful defence of the new Malayan state against an internally mounted insurgency gave the Federation Government time to begin the process of nation-building, it did not render it inviolable to external attack as the strategic situation in Southeast Asia worsened in the first half of the decade.[26]

6.10 The federation creating Malaysia in 1963 heightened tensions with Indonesia, leading to what was known as the Indonesian Confrontation or *Konfrontasi* from 1963 to 1966. Indonesia's President Sukarno's opposition to the formation of the Federation of Malaysia and his belief that it would prove a vehicle for continuing Western influence in the region, were the basis for the succession of actions which followed. Five months before Malaysia was born, Sukarno began ordering guerrilla incursions of so-called 'volunteers' into the territories of British North Borneo and Sarawak. Although a formal state of war between the two nations did not exist, the major focus of activity during this period was to defeat Indonesian aggression against Malaysia. In this period there was fighting between Indonesian, Malaysian and Commonwealth forces. The British provided most of the ground and airborne defence, with

[25] Air Board Agendum 12685 of 9 January 1958. Peter Dennis et al, *The Oxford Companion to Australian Military History*, OUP, Melbourne, 1995, p. 231.
[26] Jeffrey Grey, *Up Top: The Royal Australian Navy and South East Asian Conflicts 1955-1972,* St Leonards: Allen & Unwin, 1998, p. 42.

contributions from Australian and New Zealand forces within the FESR stationed in West Malaysia and Singapore.

6.11 After the attempted communist coup of September 1965 when General Suharto deposed Sukarno, the Indonesians signed the Bangkok accords with Kuala Lumpur in August 1966, bringing the conflict to a close. During Confrontation there were 140 British, 23 Australian and 12 New Zealand military numbers killed, and 43, eight and seven respectively wounded.

6.12 In 1967, as part of its 'East of Suez' policy, Britain announced its intention to withdraw its military forces from Malaysia and Singapore during the 1970s. The announcement caused considerable concern for Malaysia and Singapore as they had relied heavily on Britain to guarantee their security. Britain's subsequent decision to complete the withdrawal of around 26,000 troops by the end of 1971, four years earlier than originally envisaged, created considerable urgency to find a solution. Those efforts would lead to the formation of the Five Power Defence Arrangements (FPDA), involving Britain, Australia, New Zealand, Singapore and Malaysia.

6.13 The FPDA, which replaced the AMDA, were intended to be transitional, providing security for Malaysia and Singapore for a few years while they developed their own national capabilities. Instead, while there have been fluctuations in the level of involvement of its members, the FPDA continues and remains the only multi-lateral security arrangement in South-East Asia.

6.14 When the FPDA first came into operation on 1 November 1971, the three major powers formed the Australia-New Zealand-United Kingdom force called ANZUK which replaced ANZAM and the FESR. The ANZUK force consisted of some 7,100 personnel, including 3,400 Australians, with 1,500 stationed at Butterworth.

6.15 A major component of the FPDA would be an Integrated Air Defence System to which the RAAF would contribute much of the supporting air power, including the stationing of two squadrons of fighter aircraft at Butterworth. Significantly, the RAAF also held the position of Commander Integrated Air Defence System, a two-star appointment which continues to this day.

6.16 The cornerstone of the FPDA was the Communique in which the five powers agreed that in the event of any form of armed attack externally organised or supported, or the threat of such attack against Malaysia or Singapore, their governments would immediately consult together for the purpose of deciding what measures should be taken jointly or separately in relation to such an attack or threat.

6.17 In line with the changing strategic and defence environment in the region, including the end of the war in Vietnam, the ANZUK force was, however, short lived and it was disbanded in 1975. Although the number of Australian defence personnel in Malaysia was reduced during

subsequent years, Australia's commitment to regional security under the FPDA remained strong.

6.18 Meanwhile, although the Malayan Emergency was declared over in 1960, Chin Peng renewed the communist insurgency against the Malaysian Government in 1967. Following the end of the Malayan Emergency in 1960, the predominantly ethnic Chinese Malaysian National Liberation Army, the armed wing of the MCP, retreated to the Malaysian-Thailand border where it regrouped and retrained for future offensives against the Malaysian government. A new phase of internal communist insurgency began in 1968 which coincided with renewed tensions between ethnic Malays and ethnic Chinese. This insurgency would last until the signing of a peace accord with the Malaysian Government in 1989.

Butterworth history

6.19 Royal Malaysian Air Force Base Butterworth (RMAF Butterworth) is located on the north-west coast of Malaysia, adjacent to the island of Penang. The base has been of strategic importance since the Second World War, during which it was initially occupied by Royal Air Force (RAF) and RAAF units, and subsequently by Japanese forces.

6.20 Butterworth was used for RAF and RAAF activity against the Communist insurgency between 1950 and 1963 and was developed and placed under RAAF control in 1958 as part of the Commonwealth FESR. The base was formally transferred to the Malaysian Government in 1970, precipitating a requirement to generate shared arrangements between Australia and Malaysia for the defence of Butterworth.

6.21 During the Vietnam War, Butterworth provided aircraft and maintenance personnel in support of deployments and also provided medical and transport support facilities.[27] At its peak in the 1970s the base was home to almost 5,000 Australian personnel and their families.[28]

6.22 In the late 1980s Australia began to scale back the strength of its military deployment to Malaysia. The two fighter squadrons that had been permanently stationed at Butterworth since 1958 were withdrawn to Australia, with the final elements leaving Malaysia in mid-1988.[29]

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[27] *The RAAF in the War in Vietnam*, Air Power Studies Centre, The Proceedings of the 1998 RAAF History Conference, Canberra, 1999, pp 56, 88-91, accessed at https://www.radschool.org.au/Books/The%20RAAF%20in%20the%20war%20in%20Vietnam.pdf. Also Radcliffe, M., *Kampong Australia*, *The RAAF at Butterworth*, New South Publishing, Sydney, 2017, pp 178-179.

[28] *Royal Malaysian Air Base Butterworth, Australian Defence Force Facilities Rationalisation, Statement of Evidence to the Parliamentary Standing Committee on Public Works Department of Defence May 2007.* Document number 108.

[29] No. 75 Squadron remained at Butterworth until it was withdrawn to RAAF Darwin in October 1983, with No. 3 Squadron following to RAAF Williamtown in 1986. A number of former No. 3 Squadron aircraft and personnel remained at Butterworth and were formed as No. 79 Squadron RAAF, until they departed in June 1988. Website, drnet/raaf/AirForce/79SQN/History/pages/History%20of%2079SQN.aspx, accessed 25 July 2023.

6.23 On 2 December 1989, with the signing of the peace accord with the Malaysian Government, the threat of a CT attack against Butterworth finally came to an end.[30]

The Australian Army at Butterworth

6.24 In addition to the significant RAAF presence from 1955, an Australian Army battalion and supporting elements were also committed to Malaya as part of the FESR. These forces formed part of the 28 Commonwealth Independent Infantry Brigade. Between their arrival in Penang in 1955, and their subsequent relocation to Malacca in 1961, Australian Army elements took part in a number of operations during the Malayan Emergency.[31] These battalions were principally based at Minden Barracks on Penang Island. Tour length was nominally set at two years and, notwithstanding that the nature of their duties included combat operations against the CT on the Malayan Peninsula, married members were generally accompanied.

6.25 As far as the Tribunal could determine, the only Australian Army element at Butterworth - apart from the ongoing RCB detachments, and units directly supporting RAAF operations such as No. 65 Ground Liaison Section - was the 110th Light Anti-Aircraft Battery. This Australian Army unit was formed in Australia in mid-1965 and was stationed at Butterworth until mid-1969 when their guns were gifted to Malaysia and the unit was decommissioned.[32]

6.26 During the development of the shared arrangements for the defence of Butterworth in 1970, Australia assessed that neither the RMAF's nor the RAAF's own airfield security arrangements provided sufficient protection for the strategically significant volume of RAAF assets and personnel at Butterworth in light of the threat posed by CTs.[33]

6.27 As a consequence, a rifle company from the 28 Commonwealth Infantry Brigade in Singapore (an element of the FESR) was deployed to Butterworth in November 1970 to augment the ground defence capacity of the base. Companies from all three contributing nations (Australia, New Zealand and the United Kingdom) were employed in this role, initially

[30] Website, The 1989 deal that ended communist conflict in M'sia… actually allows Chin Peng's return, https://cilisios.my/the-1989-deal-that-ended-communist-conflict-in-msia-actually-allows-chin-pengs-return, accessed 25 July 2023.
[31] Radcliffe, M., *Kampong Australia*, pp 86-95.
[32] Ibid p 95.
[33] It is important to note that RAAF personnel significantly contributed to defence arrangements at Butterworth. In addition to those personnel trained in security and ground defence, the shared defence plan relied upon RAAF technicians and other personnel being trained in basic infantry techniques, tactics and procedures. These personnel, collectively known as the RAAF Mobile Reserve and Defence Flights from Nos 3, 75 and 478 (Maintenance) squadrons (and later the Base Combatant Personnel (BCP)), were the first line of defence against potential adversaries at designated Key Points. (*Shared Defence of Air Base Butterworth (Operation Order 1/71*, 8 September 1971 (Document 19710908)).

for one month tenures. In October 1971, the 28 Commonwealth Infantry Brigade relocated to Singapore, and was renamed 28 ANZUK Infantry Brigade on 1 November 1971.[34]

6.28 From 1 September 1973, Australia became solely responsible for the augmented ground security arrangements at Butterworth. Companies were deployed from Australia rather than Singapore and tenures increased to three months.[35] These rotational detachments were known variously as the Australian Army Company (AAC), the Australian Rifle Company Butterworth (ARCB) and the Australian Army Rifle Company Butterworth (AARCB).[36]

6.29 The last RCB deployment relevant to this Inquiry was withdrawn from Butterworth on 31 December 1989.

6.30 Beyond 1989 the ADF has continued to maintain a presence at Butterworth, including an RCB presence. However, while the RCB's focus before 1989 was protection of the base, its contemporary emphasis has shifted to training and bilateral exercises in Malaysia, Singapore and Thailand.

Awards

6.31 ADF operations during the Malayan Emergency were declared by the Governor-General to be a prescribed operation under the AASM 1945-1975 Regulations, allowing the award of the AASM 1945-1975 with Clasp 'MALAYA'.

6.32 ADF operations during the Indonesian Confrontation were declared by the Governor-General to be a prescribed operation under the AASM 1945-1975 Regulations, allowing the award of the AASM 1945-1975 with Clasp 'MALAYSIA'.

6.33 RCB service was declared by the Governor-General to be a prescribed operation under both the ASM 1945-1975 Regulations and the ASM Regulations, allowing the award of the ASM 1945-1975 with Clasp 'SE ASIA' or the ASM with Clasp 'SE ASIA'.

[34] After ANZUK was disbanded in early 1975, all ADF units in Singapore and Malaysia reverted to national command and control.

[35] Command and control arrangements varied significantly over time, and are mirrored in artefacts including Rules of Engagement. Australian rifle company detachments initially deployed as part of the 28 Commonwealth Infantry Brigade, until it was disestablished in November 1971; subsequent detachments were made under 28 ANZUK Infantry Brigade. With effect 1 January 1975, HQ ANZUK Force disbanded and all ADF units in Singapore and Malaysia reverted to national command and control.

[36] RCB Tour of Duty database, Annex C to Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

Chapter 7 Past consideration of Rifle Company Butterworth service: a curated chronology

7.1. In this chapter the Tribunal sets out a chronology of what appear to be the most relevant instances of previous consideration of RCB service and of other relevant developments. Where appropriate, the Tribunal has included in boxed text its own comments on or analysis of each. Given that RCB veterans have been actively and energetically lobbying and challenging Ministers and Defence on these issues since at least 2006, the chapter does not purport to be comprehensive of every individual interaction.

7.2. The *Repatriation Act 1920* had been developed over an extended period in the contexts of and specifically directed to the First and Second World Wars. Repatriation benefits in respect of the increasingly different nature of Australian operational deployments after 1945 were provided under either specific amendments to the 1920 Act (such as for Korea) or under other stand-alone legislation such as the *Interim Forces Benefits Act 1947*, the *Repatriation (Far East Strategic Reserve) Act 1956* ((the Repatriation (FESR) Act)) and the *Repatriation (Special Overseas Service) Act 1962* (the Repatriation (SOS) Act).

7.3. 7.3. On **15 November 1956** the Repatriation (FESR) Act received Royal Assent. It provided repatriation benefits for 'Malayan service' which was relevantly defined as:

... the service of the member, after the commencement of this Act, while-

> *(a) a member of, or attached to, a body, unit or detachment of the Naval, Military or Air Forces at a time when it was allotted for duty in Malaya as part of, or in association with, the Australian Contingent, British Commonwealth Far East Strategic Reserve; or...*[37]

In the form in which it was passed by the Parliament in 1956, the Repatriation (FESR) Act was capable of application to ADF service in Malaya/Malaysia where that service was provided by Australia under its obligations to the FESR. When the RCB was first deployed on 15 November 1970, deployment was pursuant to the FESR. The FESR was terminated in 1971 and thus RCB service beyond that date would not have been covered by the Repatriation (FESR) Act.

However, in 1962 the Repatriation (FESR) Act was amended to provide that it no longer applied to *service after the commencement of the Repatriation (Special Overseas Service) Act 1962*. That Act commenced on 28 May 1963.

[37] *Repatriation (Far East Strategic Reserve) Act 1956* No 91 Section 3(1).

Accordingly, RCB service pursuant to the FESR in 1970-71 was covered for repatriation purposes by the Repatriation (SOS) Act rather than the Repatriation (FESR) Act.

This change in the applicable law was of significance in that the Repatriation (FESR) Act did not provide eligibility for the service pension (as is equally the case under the VEA for 'non-warlike' service'), whereas the Repatriation (SOS) Act did provide eligibility for the service pension (as is currently the case for 'warlike service' under the VEA).

7.4. On **14 December 1962** the Repatriation (SOS) Act received Royal Assent and it came into operation on 28 May 1963. It provided repatriation benefits for 'special service' which was defined as:

> *... service of the person as a member of the Naval, Military or Air Forces during a period comprising-*
>
> > *a) a period when he is outside Australia and he or his unit is allotted for special duty in a special area ...*

with 'special duty' being defined as:

> *... duty relating directly to the warlike operations or state of disturbance ...*

and a 'special area' being declared as such in regulations made under the Act.[38]

Thus, if RCB service directly related to *warlike operations or state of disturbance,* the Repatriation (SOS) Act was capable of application to that RCB service during the period from 1970 to 1986 (when that Act was repealed). However, the Act did not in fact apply because RCB personnel were never *allotted for special duty*.

7.5. On **7 July 1965**, by Decision No. 1048, Cabinet endorsed a recommendation of an inter-departmental committee report dated 27 May 1965 (brought forward by ministers under cover of Submission 834) that:

> *the Services be directed that allotment for special duty should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces; in the present circumstances allotment should therefore be confined to personnel specially allotted for duty in relation to Indonesian infiltrators or communist terrorists in circumstances where there*

[38] *Repatriation (Special Overseas Service) Act 1962* No 89 Section 3(1).

has been a specific request for the assistance of Australian forces and where the task has been clearly defined.[39]

7.8. In making that recommendation, the Committee stated:

The responsibility for allotment for "special duty" is with the respective Services, Navy, Army and Air Force. The Committee considers that the definition of "special duty" in Section 3 of the Repatriation (Special Overseas Service) Act is sufficiently clear to indicate Parliament's intention, and considers that the desirable standard in relation to duty which is to qualify as "special duty" can be obtained within the existing legislation. The Committee observed that Cabinet (Decision No. 531 of 15 October, 1964 on Submission No. 462) had noted and concurred in the procedures of the Service Departments relating to allotment of personnel for "special duty". Nevertheless, realising the difficulty facing the Services in making precise comparisons in the varying circumstances of service, both in respect of their own Service and in respect if comparable service in other Services, the Committee feels that there is a need for a directive from Cabinet as to the ingredients which should be present before any ship, unit, formation, flight, etc., or person is allotted for "special duty". In particular, the Committee feels that an important ingredient is that there should be a real element of present danger from hostile forces.[40]

The Committee view that *the definition of "special duty" in Section 3 of the Repatriation (Special Overseas Service) Act is sufficiently clear to indicate Parliament's intention, and considers that the desirable standard in relation to duty which is to qualify as "special duty" can be obtained within the existing legislation* is of particular significance.

As noted above, the Repatriation (SOS) Act made repatriation benefits available in respect of service directly relating to *warlike operations or state of disturbance*. The Committee's concern was not with the definition of that term, but with the circumstances in which the three individual Services, then operating with their own individual Departments and without the coordinating influence of a centralised and over-arching Department of Defence, having recognised that duty was being performed in *warlike operations or state of disturbance,* allotted their members to formally recognise their participation in that duty.

The Committee recommended that, where they were engaged in *warlike operations or state of disturbance,* the Services should allot *at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces.*

[39] Cabinet Decision No 1048, dated 7 July 1965. Document number 123.
[40] Interdepartmental Committee on Eligibility for War Service Home Loans and Repatriation Benefits dated 27 May 1965, paragraph 10. Document number 123.

The *present circumstances* to which the Committee referred were the Indonesian Confrontation. The Committee's reference to *circumstances where there has been a specific request for the assistance of Australian forces and where the task has been clearly defined* was thus confined to those circumstances and should be viewed in that context.

Despite frequent assertions by Defence to the contrary, the Committee did not recommend, and the Cabinet did not decide, that a request for assistance by a foreign country was a pre-condition to allotment under the Repatriation (SOS) Act.

To imply such a requirement would be not only inconsistent with the plain English text of the Committee report and the Cabinet Decision, but would also be an illogical policy outcome that could not reasonably have been intended either by Cabinet or by the senior inter-departmental committee on whose report it relied. That is because to do so would result in a situation where Australian troops serving overseas against a hostile force acting under unilateral Australian decision would be denied the favourable entitlements that would be afforded to those serving in an equally (or even less) hostile environment but at the request of another country.

7.9. On **15 November 1970** the first RCB detachment deployed to Butterworth from Singapore.[41] Further three-monthly RCB detachments were deployed from Singapore until September 1973, but from then all future deployments were from Australia.[42]

7.10. From **14 February 1975** an Australian system of honours and awards was progressively introduced.[43] Prior to that and from pre-Federation times honours and awards for Australians were made under the Imperial honours and awards system. From 1975 the two systems operated in parallel until October 1992 when the Australian Government announced that it would no longer nominate Australians for Imperial honours and awards.[44]

7.11. On **6 June 1985** the category of 'hazardous service' was introduced into the *Repatriation Act 1920*. It was defined as *service in the Defence Force of a kind determined by the Minister for Defence, by instrument in writing, to be hazardous service for the purposes of this Act*.[45] The comparable modern definition is now to be found in section 120(7) of the VEA. Hazardous service was a new category of service to which a standard applied that was somewhat less beneficial than that applicable to service in the First and Second World Wars.

The Second Reading Speech for the Bill that became the *Repatriation Legislation Amendment Act 1985* gave no reasoning for introducing this new category of compensable service. Instead it was primarily focussed on the reasons for introducing

[41] Submission 96a Department of Defence
[42] Submission 66, Annex C, Lieutenant Colonel Russell Linwood ASM (Retd).
[43] *The Order of Australia*, *Commonwealth of Australia Gazette No. S28*, dated 17 February 1975.
[44] Media Statement by Prime Minister Keating, 5 October 1992.
[45] *Repatriation Legislation Amendment Act 1985*, Section 25, which amended Section 107 of the Principal Act (*Repatriation Act 1920*) by inserting a definition of 'hazardous service'.

the new pre-condition that there had to be a reasonable hypothesis to link service to death, injury or disease. So far as hazardous service is concerned, it merely said:

> *In addition, it is proposed to continue to apply the criminal standard of proof to claims for pension in respect of: first, a disability where a veteran had overseas war service or where, during service in Australia in World War II, the veteran was personally engaged in direct combat against the enemy; second, a disability where a veteran was allotted for operational service in Korea, Malaya, Borneo or Vietnam; third, a disability suffered by a member of the Defence Force where he served on peace-keeping duties overseas or where the member is involved in hazardous duties so designated by the Minister for Defence; and fourth, death for these three categories except where the veteran or member died or dies 40 years or more after eligible service.*[46]

The Explanatory Memorandum for the Bill however went a little further. It said:

> *[Clause 25] adds a definition of "hazardous service" which will attract the application of section 47(3)(a) to this form of service. Determination of what defence service will constitute hazardous service will be a matter for the Minister for Defence.*[47]

The exercise of the discretion thereby conferred on the Minister was subsequently affected by a 1993 Cabinet decision (discussed below). The definition of 'non-warlike' then approved by Cabinet referred to hazardous service simply as *Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty…*[48]

And a 1997 Cabinet Submission (JH97-0134 lodged by the Minister for Defence Industry, Science and Personnel and the Minister for Veterans' Affairs) noted that *The concept of hazardous service was introduced in 1985 to cover those activities which were not warlike in nature but which involve more danger or hazard than normal peacetime operations*.[49]

7.12. On **19 May 1986** the *Veterans' Entitlements Act 1986* received Royal Assent and entered into force. The VEA repealed each of the previous Acts under which Australian repatriation benefits were provided, including the *Repatriation Act 1920* and the Repatriation (FESR) and Repatriation (SOS) Acts.

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[46] *Repatriation Legislation Amendment Bill 1985*, Australian Parliament, House of Representatives, Hansard No 142 of 1985, dated 16 May 1985, p.2646.

[47] Explanatory Memorandum, *Repatriation Legislation Amendment Bill of 1985*, Australian Parliament, House of Representatives.

[48] Cabinet Decision 1691, ADF Personnel Deployed Overseas – Conditions of Service Framework, dated 17 May 1993, Submission 1021, dated 13 May 1993. Document number 25.

[49] Cabinet Minute, Expenditure Review Committee, Submission JH97/0134 dated 17 April 1997, Election commitment to Review Certain Overseas Service Not Covered by the Veterans' Entitlements Act 1986

7.13. On **13 September 1988** Letters Patent and Regulations were made to create, within the Australian system of Defence Honours and Awards, the ASM for 'non-warlike' service[50] and the AASM for 'warlike' service.[51] Each could only be awarded for service on or after 14 February 1975.

7.14. In the late 1980s Australia began to wind back its military deployments in Malaysia with the last RCB deployment relevant to this inquiry withdrawn from Butterworth on **31 December 1989**.[52]

7.15. On **17 May 1993**, by Decision No. 1691, Cabinet approved definitions of 'warlike' and 'non-warlike' for the application of conditions of service such as leave, allowances, home loans and taxation concessions in respect of ADF overseas deployments, agreed that the VEA would be amended to incorporate those definitions, and noted that recommendations for the award of medals would be aligned to those definitions.[53]

7.16. This decision was taken in response to Cabinet Submission 1021 from the Minister for Defence Science and Personnel and the Minister for Industrial Relations which noted that:

> *Overseas deployment conditions of service have initially been reviewed by the ADF to establish their application, legislative cover and approving authority. During this process it became apparent that existing legislation used differing terminology and this terminology either was not defined or did not reflect adequately the different types of deployments. Two distinct definitions to describe deployments are now proposed; "warlike" and "non-warlike". These definitions encompass existing terms contained in relevant legislation and are at Attachment B.*[54]

7.17. The definitions thereby proposed and approved were as follows:

> ***Warlike***
>
> 1. *Warlike operations are those military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties. These operations can encompass but are not limited to:*
>   a. *a state of declared war;*
>   b. *conventional combat operations against an armed adversary; and*
>   c. *Peace Enforcement operations which are military operations in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and may be engaged in combat activities.*

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[50] *Letters Patent and Regulations Governing the award of the Australian Service Medal*, *Commonwealth of Australia Gazette No S336* dated 2 November 1988. Document number 145.
[51] *Letters Patent and Regulations Governing the award of the Australian Active Service Medal*, *Commonwealth of Australia Gazette No S335* dated 2 November 1988. Document number 143.
[52] Submission 96b, Department of Defence.
[53] Cabinet Decision 1691, ADF Personnel Deployed Overseas – Conditions of Service Framework, dated 17 May 1993, Submission 1021, dated 13 May 1993. Document number 25.
[54] Ibid, Attachment B Types of ADF Overseas Deployments – Definitions. Document number 25.

Normally, but not necessarily always they will be conducted under Chapter VII of the UN Charter, where the application of all necessary force is authorised to restore peace and security or other like tasks.

Non-Warlike

2. *Non-warlike operations are defined as those military activities short of warlike operations where there is risk associated with the assigned task(s) and where the application of force is limited to self defence. Casualties could occur but are not expected. These operations encompass but are not limited to:*
    a. *Hazardous. Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty such as mine avoidance and clearance, weapons inspections and destruction, Defence Force aid to the civil power, Service protected or assisted evacuations and other operations requiring the application of minimum force to effect the protection of personnel or property, or other like activities.*
    b. *Peacekeeping. Peacekeeping is an operation involving military personnel, without powers of enforcement, to help restore and maintain peace in an area of conflict with the consent of all parties. These operations can encompass but are not limited to:*
        (1) activities short of Peace Enforcement where the authorisation of the application of force is normally limited to minimum force necessary for self defence;
        (2) activities, such as the enforcement of sanctions in a relatively benign environment which expose individuals or units to 'hazards' as described in sub-paragraph 2(a);
        (3) military observer activities with the tasks of monitoring ceasefires, re-directing and alleviating ceasefire tensions, providing 'good offices' for negotiations and the impartial verification of assistance or ceasefire agreements, and other like activities; or
        (4) activities that would normally involve the provision of humanitarian relief.

NOTES:

1. *Humanitarian relief in the above context does not include normal peacetime operations such as cyclone or earthquake relief flights or assistance.*
2. *Peacemaking is frequently used colloquially in place of peace enforcement. However, in the developing doctrine of peace operations, Peacemaking is considered as the diplomatic process of seeking a solution to a dispute*

through negotiation, inquiry, mediation, conciliation or other peaceful means.[55]

While the Submission did not recommend that Cabinet approve a separate definition of 'peacetime' service and while Cabinet did not do so, it is apparent that both the Submission and the Decision recognised that there were three categories of ADF overseas service – 'warlike', 'non-warlike' and 'peacetime'. This is because the submitted and approved definition of 'non-warlike' specifically stated that the 'hazardous' sub-category of 'non-warlike' service involved *exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty*. The question of what ADF duty would meet the implicit definition of 'peacetime' is discussed in more detail in Chapter 16.

7.18. On **27 May 1993** the Committee of Inquiry into Defence and Defence Related Awards (commonly referred to as the CIDA Inquiry) was announced. Its terms of reference required it to:

1. *Examine claims for recognition of categories of service;*
2. *Identify any categories of service, including those which involved non-Defence personnel in operational areas, which we considered should be recognised by an Australian award;*
3. *Examine the appropriateness of extending the eligibility of existing awards for such purposes;*
4. *Consider the need, if any, to introduce additional awards to recognise service in past defence-related activities of either a warlike or non-warlike nature;*
5. *Consider any other relevant matters in relation to defence-related awards; and*
6. *Make appropriate recommendations.*

7.19. To guide its consideration of these issues, the Committee developed 10 principles, the most relevant of which for present purposes were as follows:

1. *Recognition of service by medals (other than medals for long service or special occasions such as a coronation) should only occur when that service has been rendered beyond the normal requirements of peacetime. Normal duties such as training and garrison duties should not be recognised by the award of a medal, even though they may be demanding, hazardous or uncomfortable, and may be undertaken in countries other than Australia. As a general rule, medals should be reserved for the recognition of service in military campaigns, peacekeeping or other military activities clearly more demanding than normal peacetime service.*

[55] Cabinet Decision 1691, *ADF Personnel Deployed Overseas – Conditions of Service Framework*, dated 17 May 1993, Submission 1021, dated 13 May 1993. Document number 25.

2. ...
3. *To maintain the inherent fairness and integrity of the Australian system of honours and awards care must be taken that, in recognising service by some, the comparable service of others is not overlooked or degraded.*
4. ...
5. ...
6. ..
7. ...
8. *Recognising that its work requires viewing past service through the eyes of 1994, the Committee believes that an appropriate benchmark in considering hitherto unrecognised service is the terms and conditions that are currently attached to an award of the Australian Active Service and Australian Service Medals. Service rendered during this period which generally meets those terms and conditions should receive retrospective and comparable recognition.*
9. ...
10. *Matters relating to honours and awards should be considered on their merits in accordance with these principles, and these considerations should not be influenced by the possible impact, real or perceived, on veterans' entitlements.*[56]

7.20. The Committee recommended the establishment of the ASM 1945-1975 to recognise service in a prescribed peacekeeping or non-warlike operation for the period 1945-1975 to fill the gap between the Imperial Australia Service Medal 1939-45 and the existing ASM which could be awarded only for service on and from 14 February 1975.

7.21. In relation to RCB service, the Committee stated as follows:

> *A number of submissions argued for recognition of service by Australians at RAAF Butterworth Malaysia. Those who served at Butterworth include airforce personnel and an Army component of successive rifle companies, who provided a quick reaction force for base security. Some of these submissions argued that a low level Communist Terrorist threat against the base continued until the surrender of Chin Penh in 1989, and that security patrols and deployments around the base throughout the 1970's were active with live ammunition. Other submissions argued that as Butterworth played a support role to Australian Forces in Vietnam, service in Butterworth should be recognised through the award of the VLSM.*[57]
>
> *The Committee notes that the VLSM applies only to service in the declared area of Vietnam and believes that this is appropriate. It does not support an extension of the VLSM to those serving in other areas. Neither does the Committee consider that service at Butterworth was clearly and markedly more demanding than normal*

[56] *Report of the Committee of Inquiry into Defence and Defence related Awards (CIDA)* dated April 1994 p. 22 Document number 127.
[57] The Vietnam Logistic and Support Medal.

peacetime service, and therefore in terms of its Principle number 1, it does not recommend that this service be recognised through a medal.[58]

> It is clear that the CIDA Committee did not regard RCB service as either 'warlike' or 'non-warlike' because it was, in its assessment, not *clearly and markedly more demanding than normal peacetime service.*
>
> Unfortunately, the Committee report does not detail what submissions were made to it in relation to RCB service, or the reasons why it thought RCB service did not meet either of the definitions of 'warlike' or 'non-warlike' approved by Cabinet.
>
> Accordingly, while acknowledging the importance of the Committee report and the breadth of experience of its members, the Tribunal cannot view the Committee's view as compelling in the context of the current inquiry.
>
> The Tribunal takes no issue with the principles developed and enunciated by the Committee. It notes however that Principle 8 set out above seems to be at odds with the view consistently advanced by Defence since around 2010 that recognition of RCB service is to be assessed by reference to the legislation and policies of the period of that service and not by reference to those applicable at the time at which a decision on retrospective recognition is to be made.

7.22. Defence advised the Tribunal that it had been unable to locate any submission by the Department to the Government offering recommendations on what decisions the Government should make in response to the CIDA report.[59] In the Tribunal's experience, it is unlikely that such decisions would have been made without such advice, and likely that they would have been made in accordance with that advice.

7.23. Nevertheless, whatever the situation in relation to the then view of Defence in relation to the CIDA inquiry, on **19 April 1994** the then Minister for Defence Science and Personnel and the then Minister for Administrative Services jointly announced that the Government had accepted all but one of the Committee's 40 recommendations[60] (the one rejected recommendation being irrelevant for present purposes). The Minister's announcement made no mention of RCB, presumably because the CIDA report's comments on it were not couched in terms of a recommendation.

> While the terms of the Government's decision in response to the recommendations of the Committee suggests agreement that RCB service did not meet the definitions of either 'warlike' or 'non-warlike', as will later appear the Government

[58] *Report of the Committee of Inquiry into Defence and Defence related Awards* dated April 1994 p. 45 Document number 127.
[59] *Report of the Committee of Inquiry into Defence and Defence related Awards* dated April 1994 p. 45. Document number 127.
[60] Submission 96a, Department of Defence, pp.3, 105-121, 140.

subsequently decided to the contrary in 2001 when, in response to the later Mohr Review and a follow-on Defence review, the Minister recommended and the Governor-General agreed that RCB service should be declared to be 'non-warlike'.

7.24. On **22 February 1995** Letters Patent and Regulations were made to create the ASM 1945-1975 in respect of 'non-warlike' operations between 3 September 1945 and 16 September 1975.[61]

7.25. On **17 April 1997,** the Expenditure Review Committee of Cabinet decided that:

a) certain areas of overseas service (not including RCB service) should attract VEA specified treatment;
b) legislation to give effect to that, *including the Defence classification system of 'warlike' and 'non-warlike' service, should be put forward with the 1997-98 Budget programme* with existing coverage in the VEA of hazardous and peacekeeping service to remain; and
c) any past service entitlement anomalies not addressed in the Submission should be reviewed by Defence *against the principles established by the present Defence Review* [which, it is apparent from the Submission, involved assessing past service by reference to the 1993 definitions of 'warlike' and 'non-warlike'] and then *settled between Ministers and the Prime Minister*.[62]

7.26. The Ministers' submission specifically noted that *it was appropriate for the Defence Review to be based on modern criteria*, that it was *appropriate to implement the Defence Review findings* [for ADF service in Vietnam after the formal withdrawal] *by applying the modern Defence classification of 'warlike service'* and that it was proposed that *the new Defence classification system be adopted formally in the VEA for all deployments after 11 January 1973*.[63]

7.27. Cabinet endorsed the decision of the Expenditure Review Committee on **22 April 1997** (JH97/0057/CAB2).[64]

7.28. On **13 May 1997**, in accordance with the requirements of Cabinet Decision 1691 of 17 May 1993 and the subsequent decision of 22 April 1997, the VEA was amended by the

[61] *Letters Patent and Regulations Governing the award of the Australian Service Medal 1945-1975*, *Commonwealth of Australia Gazette No. S122*, dated 3 April 1995. Document number 146.
[62] Cabinet Decision JH97/0134/ER/2 (in response to Cabinet Submission JH97-0134 lodged by the Minister for Defence Industry, Science and Personnel and the Minister for Veterans' Affairs titled *Election Commitment to Review Certain Overseas Service Not Covered by the Veterans' Entitlements Act 1986)* dated 17 April 1997, Clause 1(f).
[63] Cabinet Submission JH97/0134, paragraph 12-14, page 19.
[64] Cabinet Submission JH97/0057/CAB2.

Veterans' Affairs Legislation Amendment (Budget and Compensation Measures) Act 1997 to include definitions of 'warlike' and 'non-warlike'.

> The definitions inserted in section 5C of the VEA were as follows:
>
> ***non-warlike service*** *means service in the Defence Force of a kind determined in writing by the Defence Minister to be non-warlike service*
>
> and
>
> ***warlike service*** *means service in the Defence Force of a kind determined in writing by the Defence Minister to be warlike service.*[65]
>
> While these definitions do not set out the wording of the definitions approved by the Cabinet, it is clear that, in the absence of any contrary decision by Cabinet, it was expected that, when making a determination under these provisions of the VEA, the Minister would apply the Cabinet-approved definitions.

7.29. On **11 December 1997** Letters Patent and accompanying Regulations created the AASM 1945-1975 in respect of relevant service between 3 September 1945 and 13 February 1975.[66]

7.30. In **February 2000** the *Review of Service Entitlement Anomalies in respect of South East Asian Service 1955-1974* (which has come to be known as the Mohr Review) provided its report to the Government. It had been established in 1999 to consider *possible anomalies in service entitlements affecting those members of the Australian Defence Force who served in South-East Asia during the period 1955-1975*. Its purpose was to *provide advice about relevant matters that should be taken into account for subsequent assessment of entitlements flowing from service during this period by the Department of Veterans' Affairs (for repatriation benefits) and the Department of Defence (for service medals)*.[67]

7.31 In relation to service at Butterworth after the end of the Malayan Emergency on 31 July 1960, the Mohr review recommended that Army, Air Force and land-based RAN personnel serving with FESR for periods of 30 days or more be awarded the ASM 1945-1975 with Clasp 'FESR'.[68]

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[65] *Veterans' Affairs Legislation Amendment (Budget and Compensation Measures) Act 1997*, Section 5C(1).
[66] *Letters Patent and Regulations for the Australian Active Service Medal 1945-1975*, *Commonwealth of Australia Gazette No. S18* dated 19 January 1998. Document number 144.
[67] *Review of Service Entitlement Anomalies in Respect of Service in South-East Asian Service 1955-1975*. Terms of Reference. Document number 133.
[68] Ibid, Anomalies in the Award of the ASM 1945-1975, p.10.

It is notable that, notwithstanding that the VEA had been amended to insert definitions of 'warlike' and 'non-warlike' service only shortly before the Mohr Review was established and notwithstanding that the Cabinet had settled definitions of those terms not long before that, the review report referred only obliquely to those matters.

Instead, the Mohr Review appears to have founded the many recommendations it made for recognition of ADF service on a quite different basis, by considering the concepts of 'incurred danger', 'perceived danger' and 'objective danger'. In this regard the report stated that:

> *To establish whether or not an 'objective danger' existed at any given time, it is necessary to examine the facts as they existed at the time the danger was faced. Sometimes this will be a relatively simple question of fact. For example, where an armed enemy will be clearly proved to have been present. However, the matter cannot rest there.*
>
> *On the assumption that we are dealing with rational people in a disciplined armed service (ie. both the person perceiving danger and those in authority at the time), then if a serviceman is told there is an enemy and that he will be in danger, then that member will not only perceive danger, but to him or her it will be an objective danger on rational and reasonable grounds. If called upon, the member will face that danger. The member's experience of the objective danger at the time will not be removed by 'hindsight' showing that no actual enemy operations eventuated.*[69]

The significance of this approach for present purposes is that the above wording has since been relied upon in very many of the submissions made by RCB veterans and their representative organisations when arguing that RCB service should be recognised as 'warlike'. This is most unfortunate because, as discussed below, the generally accepted official view (which was shared by the Tribunal) is that the Mohr Review took an interpretation of the concept of incurred danger that was incorrect and unsupported by decisions of the courts.

That unfortunate result was further compounded by the fact that, after the VEA amendments to insert the definitions of warlike and non-warlike service, the term 'incurred danger' was not an element required for the qualifying service which RCB veterans and organisations sought to have accepted – unless the VEA was amended to deal specifically with RCB service, they could only be accepted as having provided qualifying service if their service was determined by the Minister to be 'warlike service'.

It is also significant that, because the Mohr Review did not analyse RCB service by reference to the Cabinet-approved definitions of 'warlike' and 'non-warlike', it did not explain why it considered RCB service should be recognised by the ASM 1945-1975 as opposed to the AASM 1945-1975.

[69] Ibid, Chapter 2, p. 9.

Accordingly, the Tribunal could not regard the Mohr Review as particularly persuasive in relation to the matters before it.

7.32 On **17 March 2000** the Minister Assisting the Minister for Defence, the Hon. Bruce Scott MP brought forward a Cabinet submission seeking agreement to a Government response to the Mohr Review. The Minister stated:

> *The review concludes that there are a considerable number of deployments of ADF personnel to SE Asia 1955-75 where the determination of entitlements to medals and repatriation benefits is anomalous. On the basis of the new information provided in the Mohr Report, the Department of Defence has reassessed each deployment against the criteria of 'warlike' and 'non-warlike' as directed by Cabinet on 22 April 1997 in Cabinet Minute JH/0057/CAB/2. The results are in most cases identical to the recommendations of the Mohr Report. While extending these entitlements, I propose to reject the Mohr Review's policy analysis which could have significant flow-on effects under the Veterans' Entitlements Act 1986. I propose instead to affirm the current set of objective criteria for assessment of 'warlike' and 'non-warlike' service and thereby provide the framework against which any further historic claims and all future service can be assessed.*[70]

7.33 In elaboration on the issue of the policy approach adopted by the Mohr Review, the Minister said:

> *While there is no specific recommendation on the matter, in general discussion, the Mohr Review expresses a view on current repatriation entitlement for determining entitlement to full repatriation benefits. This policy includes a longstanding requirement that a veteran must have incurred actual danger, as distinct from a perceived danger, from hostile forces of the enemy at a time when that person was engaged in operations against the enemy. The Review adopts a particular approach to the decision on whether actual danger was incurred, and then uses this approach as the basis of the Report's recommendations to grant full repatriation benefits. The approach adopted by the Review is considered by the Department of Veterans' Affairs to be at odds with judicial precedent. If accepted, it could significantly extend veteran benefits in other circumstances. While the Defence consideration of 'warlike' and 'non-warlike' service has come to the same conclusion as the Mohr Review on benefits for particular deployments, it has done so on grounds that are different from those in the Review. When responding to the report it will be necessary to explain to veterans why the logic expressed in the report is not accepted.*[71]

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[70] Cabinet Submission No JH00/0088 dated 17 March 2000, NAA A14370, JH2000/080, p.4. Submission 96b, Department of Defence.
[71] Ibid, p.7.

7.34. Attachment C to the Minister's submission relevantly stated that Army and RAAF FESR service from 2 July 1955 to 30 October 1971 (other than service during the Malayan Emergency or Confrontation) *should be recognised for the purpose of granting of the ASM.*[72]

7.35. The Minister's submission also recommended that:

> *the awarding of medals is not a suitable test for repatriation entitlements and, where appropriate, any such nexus should be removed from the* [VEA].[73]

7.36 Cabinet agreed to the Minister's recommendations on **21 March 2000**.[74]

> It is clear that it was the Mohr Review's interpretation of 'incurred danger' to which objection was taken, and that it was the 1993 definitions of 'warlike' and 'non-warlike' which were applied by Defence in reassessing each of the deployments for which repatriation benefits or medals were recommended by the Mohr Review and which the Minister stated in his Submission would be used for assessing *any further historic claims and all future service.*
>
> In relation to the awarding of medals not being a suitable test for repatriation entitlements, the Tribunal noted earlier in this report that the grant of a medal does not give automatic right to entitlement under the VEA and that a separate Ministerial instrument under the VEA is required – albeit that Cabinet had decided in 1993 that common definitions of 'warlike' and 'non-warlike' should apply to service conditions, veterans' entitlements and medallic recognition.
>
> In relation to the proposal to amend the VEA to remove medallic recommendation as a nexus for veterans' entitlements, it is notable that sub-paragraphs (ii), (v) and (vi) in section 7A(1)(a) and other provisions in section 7A to this day still maintain that nexus.[75]

7.37 Subsequent to the Cabinet decision on the Mohr Review, on **19 July 2000** Defence submitted to Minister Scott that RCB service beyond the cessation of the FESR in 1971 be recognised up to at least 1975 with the 'SE ASIA' Clasp rather than the 'FESR' Clasp as recommended by the Mohr Review, and that consideration be given to recognition of service up to 1989. In this regard, the Acting CDF said:

> *Butterworth will no doubt continue as an issue, particularly for the Rifle Company (RCB). This should be investigated further, with the possibility of an extension to 1989 when the terrorist threat from the Malaysian Communist Party finally concluded with the signing of the peace accord by its leader, Chin Peng. RCB service was to*

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[72] Ibid, p19.
[73] Ibid.
[74] Cabinet Decision JH00/0088/CAB dated 21 March 2000, Recommendations, p.5.
[75] *Veterans' Entitlements Act 1986* as amended 4 November 2022 Compilation No 180.

protect the base against terrorist insurgency and it may therefore be difficult to argue that this service was not non-warlike for medals purposes. [76]

7.38 On **30 August 2000** Minister Scott announced the Government's response to the Mohr Review, including the introduction of a Clasp 'SE ASIA' to the ASM for land service in Malaysia between 1955 and 1971, and that a further detailed submission would be prepared to address service in South East Asia after 31 October 1971, in the course of which service of the RAAF and the RCB at Butterworth would be considered. [77]

7.39 On **4 September 2000** the then Secretary of Defence responded *Yes* to an email query from a C.J. Duffield who asked with regard to service at RAAF Butterworth between 31 October 1971 and 1975 *Is it true that Australian intelligence reports (currently held in archives) indicate several incidents involving CT and Australian troops*. [78]

> So far as the Tribunal can ascertain, there is no other record of any such activity. In the absence of any independent corroboration, the Tribunal did not place any weight on this statement.

7.40 On **2 January 2001** the then Chief of the Defence Force, Admiral Chris Barrie, provided a submission to Minister Scott covering a paper entitled *ADF Medals Policy – Where We Have Been and Where We Are Going*. The CDF stated that the paper had been cleared by the three Service Chiefs. He recommended that the Minister *approve the recommended policy for the future award of the ASM and ASM 1945-1975* and *seek to establish a bipartisan approach to the proposed policy*. The CDF noted that the Minister had requested a *well developed paper on medals policy* and that this had been written *mainly around recognition of 'non-warlike' service by awards of the [ASM and ASM 1945-75] as it is mostly these medals which come under argument by the current and ex-Service communities.* [79]

7.41 The Minister marked the submission as 'Approved' some considerable time later, on **28 June 2001**. [80]

7.42 The focus of the paper was a concern that the ASM and ASM 1945-1975 had been awarded in numerous circumstances that gave rise to anomalies or perceived anomalies and which led to calls from ex-service personnel or representative organisations for further additional awards that would generate yet further anomalies.

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[76] Ministerial Submission CDF 440/2000, Acting Chief of the Defence Force to Minister Assisting the Minister for Defence, dated 19 July 2000. Department of Defence submission 96, p.28.
[77] Ministerial News Release Min 239/00 *'42,000 New Medal Entitlements for South-East Asian Service 1955-75'*, dated 30 August 2000. Document number 71.
[78] Email from Dr Allan Hawke, Secretary of Department of Defence to Mr Duffield dated 4 September 2000.
[79] Email from Mr Ian Heldon, Director Honours and Awards, to the Executive Officer of the Tribunal, Mr Jay Kopplemann, dated 7 December 2022, pp 8-23.
[80] Ibid p. 5.

7.43. It stated that in 1992 the three Services had agreed on the following criteria for the award of the ASM and the ASM 1945-1975:

> *a. Specific exclusions*
>
> *(i) Normal overseas service in diplomatic, representational, exchange, training or Defence cooperation activities, regardless of the hazards associated with that service; and*
>
> *(ii) Assistance in ADF aid to the civil community, either in Australia of overseas, where that service is integrated with other civilian organisations and any threat does not require the use of uniquely military skills, eg. humanitarian relief or assistance as a result of natural disasters.*
>
> *b. Activities not so excluded be judged against:*
>
> *(i) service not involving warlike activities in a state of declared war or combat operations against an identified enemy or belligerents;*
>
> *(ii) the likelihood of service being conducted overseas;*
>
> *(iii) being activities military in nature, using military skills and specialist resources according to the area (circumstances) and/or self protection, eg, rather than an activity involving skills that are available within civilian organisations;*
>
> *(iv) involving elements of military threat or hazard;*
>
> *(v) conducted at the direction of Government, rather than an ADF decision alone; and*
>
> *(vi) likelihood of the activity being of a prolonged duration of 30 days or more.*[81]

7.44. The CDF recommended (and the Minister subsequently agreed) that, to avoid future anomalies in the award of the ASM and the ASM 1945-1975, the following revised policy should be adopted:

> *To retain some value, it is recommended that the ASM should be awarded for service which, in every case, is the subject of a formal declaration of 'non-warlike' operation or activity by the responsible Minister.*
>
> *27. To retain some value, it is recommended that the ASM should still be awarded for service which, although it may not be the subject of a formal declaration of 'non-warlike' operation by the responsible Minister, can still be put into a category which may be regarded as non-warlike and declared accordingly under the ASM 1945-75/ASM regulations. Using the 1992 Service agreement as a basis, but adjusted to cater for the new benchmark set by recent changes as a result of CIDA, the*

[81] Ibid, pp. 16-17.

Government's policy and the SEA Review, a prescriptive minimum set is recommended as follows:

a. service rendered in situations that include international security treaties or agreements, eg. FESR, SEATO, ANZUK, MFO, Five Power Agreement etc;

b. service involving that with an international coalition force and where other countries involved have recognised their defence personnel with a medal, eg. UN deployments, MFO and situations such as the Gulf crisis 1990/91;

c. activities conducted at the direction of Government, rather than an ADF decision alone, which require the use of military skills unavailable to civilian organisations at the time and are of a nature that allow the activity to be declared non-warlike on the recommendation of the CDF vide the 1945-75/ASM regulations.

d. humanitarian service as a result of human disaster involving civil unrest, rather than natural disaster, where that service involves a military presence for self protection and protection of the community involved, eg. Kurdish relief after the Gulf war in Iraq in 1991, and Rwanda in 1994;

e. activities of a special or particularly dangerous or hazardous nature, in Australia nor overseas, involving military skills not available to civil powers at the time which result in control being given to the ADF to conduct the activity in part or in full (this recommendation meets the CIDA recommendation, accepted by the CDF and the Government in 1994, that certain hazardous activities of a special nature, eg. counter terrorist activities and other similar activities, should be considered for awards of the ASM based on their merits);

f. qualification to be set at 30 days except where activities involve an imminent threat or war, activities are so short of warlike that they carry similar hazards, special operations outside of normal operations involving associated increased risks, or particularly dangerous or hazardous situations, eg. those outlined in subparagraph e. above, service such as that rendered immediately before the Gulf War in 1991, forward intelligence operations, hot extractions; and

g. service on exchange duties with a foreign defence force in a hazardous area, not declared by the responsible Minister as a non-warlike area of operations for ADF deployment, be generally excluded (although in some cases it may be appropriate to assess such service in its merits against a particular reason behind a formal third country deployment approval).

28. *Absolute exclusions recommended are:*

a. *service involving warlike activities in a state of declared war or combat operations against an identified enemy or belligerents (an area declared 'warlike' by the responsible Minister);*
b. *normal overseas service in diplomatic, representational, exchange, training or Defence cooperation activities (this exclusion does not apply to members conducting these activities in an area subject to formal declaration of non-warlike);*
c. *assistance in ADF Aid to the Civil Community, either in Australia or overseas, where the service is integrated with other Commonwealth, State or civilian agencies such as the State Emergence Service Organisations or National Parks and Wildlife, and that service or threat does not require the use of uniquely military skills, eg. Relief or assistance as a result of natural disasters such as drought or bushfires, and assistance to Australian National Antarctic Research Expeditions; and*
d. *normal duties carried out either in Australia or overseas involving no military risk or threat, whether in a capacity of regular, reserve or conscripted service in order to meet Government/ADF ceilings.* [82]

In drawing the Tribunal's attention to this submission, Defence stated that it was relevant to *the Defence position on the separation of definitions which apply to nature of service and honours and awards*. [83] At hearings it became apparent that Defence regarded the Minister's approval of this submission as authority for the proposition that, in relation to medallic recognition, the term 'non-warlike' means 'other than warlike' and thereafter did not bear the meaning set out in the 1993 Cabinet-approved definition.

The Tribunal understood this to be in response to the Chair's suggestion at the hearing of 23 November 2022 that the Defence submission to the present inquiry was internally inconsistent when it stated that RCB service could simultaneously be classified as 'peacetime' for nature of service purposes and 'non-warlike' for medallic recognition purposes.

It appears that, in this regard, Defence was relying on the terminology in paragraph 27 quoted above where it was stated that:

> *the ASM should still be awarded for service which, although it may not be the subject of a formal declaration of 'non-warlike' operation by the responsible Minister, can still be put into a category which may be regarded as non-warlike and declared accordingly under the ASM 1945-75/ASM regulations.* [84]

[82] Ibid, p.17.
[83] Ibid, p.1.
[84] Ibid, pp.16-17.

Whether the paper and the Minister's endorsement of it in fact provided any support for the Defence proposition in its submission to the Tribunal that service can be simultaneously peacetime and non-warlike requires detailed consideration of what the paper actually said.

The paragraph immediately preceding the text quoted above states that:

> *To retain some value, it is recommended that the ASM should be awarded for service which, in every case, is the subject of a formal declaration of 'non-warlike' operation or activity by the responsible Minister.* [85] (emphasis added)

thereby suggesting that the ASM should never be awarded unless the Minister had first declared relevant service to be 'non-warlike'.

Notably, in the context of the Tribunal's 2010-11 *Inquiry Into Recognition for Members of the Australian Defence Force for Service in Papua New Guinea After 1945,* Defence informed that Tribunal that:

> *In 2001, the then Minister Assisting the Minister for Defence agreed to the specific conditions for which the Australian Service Medal (ASM) may be awarded, together with absolute exclusions. These are as follows:*
>
> *a. activities or operations where an overarching non-warlike declaration by the Minister for Defence exists;*
> ….[86]

It then listed, albeit in slightly different terms, the categories of service recommended by the CDF for recognition by way of the ASM, but without any reference to *a formal declaration of 'non-warlike' operation or activity* by the Minister being unnecessary. This suggested that the intended policy was that an Australian Service Medal should never be awarded unless the Minister had first declared relevant service to be of a non-warlike nature.

An alternative interpretation of the paper might be that all service that had been declared 'non-warlike' by the Minister for the purposes of service terms and conditions should automatically qualify for the ASM, but that service not so declared might also qualify if it was of a type specified in paragraph 27. This could perhaps be appropriate where the assessment of service was historic rather than prospective. In such a case, service terms and conditions would have already been determined and applied, and the extension of medallic recognition without reopening terms and conditions entitlements might be justifiable. Indeed, the 1993 Cabinet decision

[85] Ibid, p16.
[86] *Report of the Inquiry in Recognition by Members of the Australian Defence Force for Service in Papua New Guinea after 1975,* dated 14 July 2010, Appendix 4 'Policy Relating to the Australian Service Medal', Defence Honours and Awards Tribunal, p. 27.

provided that Ministerial determinations on the new terms and conditions should only be made prospectively. Unfortunately, if the intention was that service of a type specified in paragraph 27 should qualify for the ASM despite that lack of a Ministerial declaration that it was 'non-warlike', it was not at all clear from the paper.

There are further aspects of the paper where there is an additional lack of clarity.

It acknowledged at paragraph 5, and attached, the Cabinet-approved definitions of 'non-warlike' and 'warlike' as the tests for recognition of operational service. Nowhere did it suggest that those definitions should be changed or ignored. And yet, read in their express terms, various of the categories of service recommended by the CDF for recognition by way of an Australian Service Medal would potentially not meet the definition of 'non-warlike' which is the core eligibility criterion for award of that medal. For example:

> *c. service involving that with an international coalition force and where other countries involved have recognised their defence personnel with a medal, eg. UN deployments, MFO*[87] *and situations such as the Gulf crisis 1990/91;*

Unless international recognition for such service was subject to the same eligibility criteria as embodied in the 'non-warlike' definition, it is quite possible, if not likely, that it would not meet that definition and qualify for the ASM. Moreover, having regard only to the wording quoted above, an ASM would be awarded for service recognised by a foreign award regardless of whether or not the criteria for that award related to 'peacetime', 'non-warlike' or 'warlike' service. It would seem to have been most peculiar for the CDF to have intended to recommend that the ASM rather than the AASM be awarded for warlike service.

In contrast, certain other categories either made specific reference to the need for compliance with the applicable legislation, such as:

> *a) activities conducted at the direction of Government, rather than an ADF decision alone, which require the use of military skills unavailable to civilian organisations at the time and are of a nature that allow the activity to be declared non-warlike on the recommendation of the CDF vide the 1945-75/ASM regulations.*

or made some reference to the hazardous nature of the service in question.

Thus, it was not clear whether the intention was to recommend award of the ASM for service in each of the listed categories <u>whether or not</u> they met the definition of 'non-warlike' or <u>only</u> if they did so.

There were multiple other errors and problems in the paper put to the Minister:

[87] Multinational Force and Observers operating primarily in the Sinai Peninsula.

a) it stated that the ASM was introduced in 1992 when in fact it was created in 1988;

b) it stated that the definitions of 'warlike' and 'non-warlike' were determined *following discussions between Defence and Cabinet in 1994* when in fact the Cabinet decision was in 1993 and taken in response to a joint Cabinet Submission from the Minister for Defence Science and Personnel and the Minister for Industrial Relations – there was no relevant interaction between Defence and the Cabinet;

c) it reflected a clear misunderstanding of the respective roles of the CDF and the Minister, the Governor-General, the Prime Minister and the Sovereign in the creation and award of medals when it stated:

   i. at paragraph 20: *Despite the 1992 agreement by the three Services of a set of criteria for the award of the ASM and the principles established by CIDA, there have been awards of the ASM outside of these. Consequently, the independence of the Chief of the Defence Force to make decisions relating to how members of the Defence Force should be recognised for their service has been reduced.* – the role of the CDF is limited to simply identifying those individuals who meet the eligibility criteria determined by the Governor-General on the recommendation of the Minister for an award created by the Sovereign on the recommendation of the Prime Minister; and

   ii. at paragraph 25: *significantly, CIDA and the more recent SEA Review have turned what is essentially an ADF matter into a highly political one*.

The award of an Australian Service Medal for RCB service (agreed by the Minister on the recommendation of Defence in the preceding year) was not specifically mentioned in the paper as one of the anomalies on which it was focussed – indeed, while it had been agreed, the relevant declarations under the Regulations had not yet been made. However, it may possibly have been intended to be covered by the following references:

d) in paragraph 18.c: *... it is too early to predict what the full impact of the SEA Review Recommendations will have in respect of new or further anomalies. Some which have been identified are: ... Criticism from ex-Service organisations that the recommendations did not go far enough for recognition of service in Butterworth after cessation of the FESR in 1971 ...*;

e) in paragraph 25: *The decisions to award ... the ASM 1945-75 for ... service in South East Asia generally for the period 1955-71 have considerably changed the benchmark for awarding service medals. ... For example, most of the service in Singapore and Butterworth was rendered under normal peacetime garrison conditions with additional luxuries not experienced in Australia such as the availability of housemaids and servants.*

Clearly it is appropriate for the CDF and/or Defence to provide advice to the Minister as to the policy the Minister (not Defence) should apply in deciding whether to declare service to be non-warlike to render particular conditions of service applicable, to determine service to be non-warlike for the purposes of the VEA, and to make recommendations to the Governor-General for the declaration of non-warlike operation under ASM Regulations. However, it is unfortunate that the advice provided on this occasion was not rigorously developed and expressed.

Whatever else might be said about this paper and the Minister's approval of it, the Tribunal considered it to be clear that:

f) it did not propose or effect any change to the definitions approved by the Cabinet in 1993, and indeed seems to reaffirm them;

g) it did not expressly propose that, for medallic recognition, 'non-warlike' should in future mean 'other than warlike' instead of the definition of that term approved by Cabinet in 1993;

h) furthermore, it was not a reasonable inference that the Minister's approval of the submission amounted to a decision that in future 'non-warlike' should mean 'other than warlike' instead of the 1993 Cabinet-approved definition;

i) it did not provide any authority for overturning the 1993 Cabinet Decision that common definitions of 'warlike' and 'non-warlike' service were to apply for each of conditions of ADF service, veterans' entitlements and medallic recognition;

j) the inconsistencies (perhaps even flawed logic) within the document did not provide a sound foundation for the view that RCB service could simultaneously be classified as 'peacetime' for nature of service purposes and 'non-warlike' for medallic recognition purposes;

k) it did not state, and provided no evidence, that RCB service was 'peacetime' service;

l) it did not state that RCB service should not be recognised by way of an Australian Service Medal (as had been earlier decided but not by that stage implemented); and

m) it did not at any stage address the question of whether or not RCB service could fall within the definition of 'warlike'.

7.45. On **23 March 2001** the Governor-General, on the advice of the Minister for Defence, declared *Defence force activities on land in Malaysia, except those warlike operations prescribed from time to time by the Governor-General that occurred on the Thailand-Malaysia border, that commenced on 12 August 1966 and ended on 31 October 1971* to be a 'non-warlike operation' under the ASM 1945-1975 Regulations. [88] This gave effect to the decision announced by Minister Scott that RCB service as part of FESR should be recognised by the ASM 1945-1975.

7.46. The follow-on review by Defence announced by the Minister in August 2000 that was to further consider RCB service was to be completed by end-2000. In late December 2000 a draft submission to the Minister was submitted to the Chief of the Army and the Chief of the Air Force.[89] After agreement by them in February and March 2001, it was submitted to the CDF on 21 March 2001.[90] The CDF raised a number of questions about the draft and was advised that:

a) *While the Mohr Review terms of reference covered the period 1955 to 1975, service at Butterworth after 1971 had not been considered because a more specific part of those terms referred to service in SE Asia in relation to the geo-political context of FESR which concluded on 31 October 1971*;

b) *The extension of recognition is based on the principle established by MAJGEN Mohr, during his deliberations on service in SE Asia that if ADF personnel are placed in circumstances where they may be used to react to an assessed threat made by Australian Government Intelligence agencies, it has to be considered operational service. This is regardless of whether that threat is realised or not*;

c) *Also, the recommendations are consistent with CIDA Principle No 3 which states, inter alia,* care must be taken that in recognising service by some, the comparable service of others is not overlooked or degraded; and

d) *RAAF service as part of the FPA*[91] *and other service under ANZUK were both 'flow-ons' from FESR and established under the same principles of FESR to provide*

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[88] *Declaration and Determination under the Australian Service Medal 1945-1975 Regulations*, Commonwealth of Australia Gazette No. S102, 27 March 2001.
[89] Minute HDPE 683/2000 Head Defence Personnel Executive, to Chief of the Army and Chief of the Air Force, dated 20 December 2000. Included in Submission 96, Department of Defence.
[90] Defence Personnel Executive Minute to Chief of the Defence Force CDF/FC 105/01, included in Submission 96, Department of Defence.
[91] Five Power Defence Arrangements (between Australia, Malaysia, New Zealand, Singapore and the United Kingdom).

security to the SE Asia region until 1989. At this point, arrangements changed to training under DCP,[92] *as a result of the region becoming more stable.* [93]

7.47. On **10 April 2001** the CDF forwarded the submission on the Defence follow-on review to Minister Scott who approved its recommendations. The CDF's advice included the following:

a) *In 1970, the Rifle Company Butterworth (RCB) was raised to provide a quick reaction force to meet the communist terrorist threat and provide internal security and protection for Australian assets within the perimeter of Royal Malaysian Air Force (RMAF) Base Butterworth.*

b) *In view of the conditions that existed in Singapore and Malaysia after the Indonesian Confrontation on 11 Aug 66 and until the end of FESR on 31 Oct 71, it is considered that duties in Butterworth are equally deserving of an award due to the terrorist threat which existed and the purpose of maintain regional security. This is in keeping with CIDA principles.*[94]

7.48. On **9 May 2001** Minister Scott announced that the Government had accepted the recommendations of the Defence follow-on review of service in Singapore until 1975 and in Butterworth until 1989. He said that:

These medal entitlements recognise the vital role that Australian servicemen and women have played in the stability and security of South East Asia during a period of significant tension. [95]

7.49. On **8 June 2001**, on the recommendation of the Minister for Defence, the Governor-General declared:

a) under the ASM Regulations, Defence Force activities on land in Malaysia between 14 February 1975 and 31 December 1989, being non-warlike operations in which members of the ADF were engaged, including with Australian Rifle Company Butterworth as a prescribed operation for the purposes of the ASM; [96] and

b) under the ASM 1945-1975 Regulations, Defence Force operations on land in Malaysia between 12 August 1966 and 14 March 1975, being non-warlike operations in which members of the ADF were engaged with elements of the South East Asia

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[92] Defence Cooperation Program.

[93] Defence Personnel Executive Minute to Chief of the Defence Force CDF/FC 105/01, included in Submission 96, Department of Defence p. 46.

[94] Australian Defence Headquarters Minute to Minister Bruce Scott, MP, included in Submission 96, Department of Defence p.49.

[95] Media Release *'15,000 New Medal Entitlements for South East Asian Service'* dated 9 May 2001, Submission 96a, Department of Defence.

[96] *Declaration and Determination under the Australian Service Medal Regulations with Clasp 'SE ASIA', Commonwealth of Australia Gazette No S230* dated 29 June 2001.

Treaty Organisation; the Australia, New Zealand the United States (Pacific Security) Treaty; the Far East Strategic Reserve; the United Nations; the Australia, New Zealand and United Kingdom (ANZUK); Five Power Defence Arrangement; and Australian Army Survey Operations in South East Asia, to be a prescribed non-warlike operation for the purposes of the ASM 1945-1975 Regulations. [97]

7.50. On **5 September 2001** an Assistant Adviser to Minister Scott wrote to Mr Robert Cross of the 8/9 RAR Association at the Minister's request. [98] She stated:

> *From 11 August 1966, following the cessation of the Indonesian Confrontation, conditions at Butterworth became rather benign, with long term posted personnel being accompanied by their families. Shops operated on the base and at its height, Australia employed a number of Australian Public Service civilians, as well as civilian teachers for the ADF children attending school on Penang Island. A reduction of the ADF presence over the years has seen most of the civilian positions for Australians decline and the use of locals instead. Although there may have been a Communist terrorist threat, it was more of a nuisance to Malaysia, rather than a serious threat to undermine its government and political system. Under these conditions, it is unreasonable to claim that service in Butterworth since 1966 could be anything more than non-warlike at the very most.* [99]
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> [Another letter in generally the same terms was sent by another Assistant Adviser to then Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, the Hon Danna Vale MP, to Mr S.L. Hannaford on 21 January 2003.] [100]

7.51. On **20 February 2002**, on the recommendation of the Minister for Defence, the Governor-General declared, under the ASM Regulations, Defence Force activities on land in Malaysia between 14 February 1975 and 31 December 1989, including with Australian Rifle Company Butterworth, to be a prescribed 'non-warlike operation'. [101]

7.52. This further declaration gave final effect to Minister Scott's decision on the Defence follow-on review.

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[97] *Declaration and Determination under the Australian Service Medal 1945-1975 Regulations with Clasp 'SE ASIA' Commonwealth of Australia Gazette No S230* dated 29 June 2001. Document number 147.

[98] Letter, Assistant Adviser to the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, the Hon Bruce Scott MP. Document number 141, p. 2.

[99] Ibid pp. 2-3.

[100] Letter Assistant Advisor to the then Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, the Hon Danna Vale MP, to Mr S L Hannaford dated 21 January 2003. Document number 140.

[101] *Governor-General's Determination signed under the Australian Service Medal Regulations on 20 February 2002, Commonwealth of Australia Gazette, No. S64* dated 28 February 2002. Document number 148.

7.53. On **6 January 2003** the report of a Committee established in February 2002 by the then Minister for Veterans' Affairs, the Hon Danna Vale MP, to review veterans' entitlements (which has come to be known as the Clarke Review) was completed. The Committee made 109 recommendations. Of present relevance, recommendation 25 was as follows:

> *25 No further action should be taken in respect of peacetime service at Butterworth after the cessation of Confrontation and with ANZUK after the cessation of Confrontation.* [102]

7.54. The text of the report provided the following rationale for that recommendation:

> *14.135 Because of a residual presence of communist terrorists under the leadership of Chin Peng in Malaysia, and the continued presence of two RAAF fighter squadrons and support forces at Butterworth, the Commonwealth Government decided to assist base security by deploying an infantry company known as Rifle Company Butterworth (RCB) to the base in 1970. The RCB was deployed to be a ready reaction force to counter any major insurgency at the base.*
>
> *14.136 The RCB's tasks were infantry training and after-hours patrolling of the perimeter of the base, thereby contributing to base security in conjunction with the Malaysian security forces, the RAAF Airfield Defence Guards and RAAF Police dogs. Its rules of engagement were protective only. Although there is no doubt that the RCB was involved in armed patrolling to protect Australian assets, it is clear that training and the protection of Australian assets are normal peacetime garrison duties.*
>
> *14.137 Essentially, the prime aim of the FPDA was to provide regional security and stability, and forces were pre-positioned to do so. These included RAN fleet units. However, like the activities of FESR forces not involved in warlike conflicts such as the Malaysian Emergency and the Indonesian Confrontation, the activities of forces assigned to ANZUK were peacetime operations and training, without active rules of engagement, military objectives, or threat from enemy action.*
>
> *14.138 No evidence was found that service in South-East Asia currently established as peacetime service should be considered warlike. No operational area was prescribed, no specific armed enemy threat was present and there were no rules of engagement to pursue specific military objectives. Although the service occurred overseas, it could equally well have been performed as part of peacetime activities in Australia. The Committee understands that peacetime service, whether rendered in Australia or overseas, can at time be arduous and even hazardous. However, on its own, this is not enough to warrant its consideration as operational or qualifying service for benefits under the VEA.*

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[102] Report of the Review of Veterans' Entitlements, Recommendation number 25, p. 55. Document number 128.

14.139 The Committee concludes that neither warlike nor non-warlike service was rendered in Malaysia or Singapore immediately following the cessation of Confrontation on 11 August 1966, or subsequently under the FPDA or ANZUK. [103]

It is clear from the report of the Clarke Review that the Committee was aware of and had regard to the 1993 Cabinet-approved definitions of 'warlike' and 'non-warlike'.

However, the report did not make clear what was said about RCB service in the submissions that were made to it. Given that the review was conducted before the creation of the RCB Review Group, it seems likely that those submissions would predominantly have been from individual RCB veterans based on their own deployments of around three months each, and perhaps not particularly sophisticated or comprehensive.

Whatever was said about RCB service in the material available to the Clarke Review panel, in the view of the Tribunal it is apparent that the report's description of RCB service as *infantry training and after-hours patrolling of the perimeter of the base* was inaccurate and incomplete. As the report itself recognised, the RCB was *deployed to be a ready reaction force to counter any major insurgency at the base.*

The Tribunal will consider later in this report the accuracy of the Clarke Review statement that *there were no rules of engagement to pursue specific military objectives.*

The report did provide some analysis correlated to the 'warlike' definition for its view that RCB service was not 'warlike'. (For reasons that are not immediately apparent, the report used a modified definition of the 1993 'warlike' definition, in which it referred to the application of lethal force being authorised (paragraph 14.141), as opposed to the application of force being authorised). However, it provided no corresponding analysis for its view that RCB service was not 'non-warlike'.

Of significant concern to the Tribunal was the analysis that RCB service was 'peacetime' because training and guarding activities would also be undertaken in peacetime. This suggested that such activities would not be undertaken in 'warlike' or 'non-warlike' conditions when plainly that is not correct. Indeed, in such situations training and guarding take on even greater significance than they do in peacetime.

Also of concern was the report's apparent recognition that RCB service may have been hazardous, which would be inconsistent with its conclusion that RCB service was not 'non-warlike'.

In view of these concerns, the Tribunal cannot regard the views expressed by the Clarke Review in relation to RCB service as being in any way compelling or even forceful.

[103] Report of the Review of Veterans' Entitlements Volume 2 Chapter 14, pp. 333-4. Document number 131.

7.55. On **4 March 2003** the then CDF, General Peter Cosgrove, provided a submission to then Minister Vale in which he advised the Minister of decisions taken by the Chiefs of Service Committee on 19 February 2003 relating to recommendations of the Clarke Review. He advised the Minister that:

> *2. The COSC had an overriding concern with the approach taken by the Clarke Committee, which led it to recommending retrospectivity. The COSC did not support the concept of applying today's standards and values ('current best practice' as stated by Clarke) in determining the nature of service of military operations to past conflicts and operations.*
>
> *3. The COSC took the view that military authorities made decisions and recommendations to Government about the operations for which they were responsible in good faith and drawing on the best intelligence and knowledge available at the time. In the opinion of the COSC, it would be confusing for personnel deployed on operations if decisions based on the Chief of the Defence Force could be overturned for no other reason than the emergence of different standards and values over time. As the Clarke outcome shows, retrospectivity comes with a significant cost. This is not to suggest, however, that genuine anomalies should not be dealt with through the appropriate processes, such as by the Repatriation Commission and the courts.* [104]

7.56. The CDF's minute then discussed various Clarke recommendations in relation to specific operations, none of which were relevant to RCB service. An attachment to the minute listed those recommendations which the COSC opposed and those which it supported. The number of recommendations listed was far less than the 109 recommendations made in the report. The CDF noted that *The foregoing issues will be highly sensitive within the veterans' community. Within the ADF, there may be come opposing views on confining retrospectivity to obvious anomalies*. [105]

7.57. The CDF concluded by recommending that the Minister *note the decisions of COSC*. He attached a summary of COSC decisions, opposing specified Clarke recommendations and supporting others. [106]

> The COSC meeting to which the CDF referred appears to be the genesis of what later came to be referred to as the policy that *all nature of service reviews are conducted in the context of the legislation and policies that applied at the time of the activity or operation under review*.

[104] CDF Ministerial 268/2003 Clarke Review of Veterans' Entitlements Decision of the Chiefs of Service Committee, dated 4 March 2003, paragraphs 21 and 22.
[105] Ibid.
[106] Ibid.

It is notable that the CDF recommended only that the Minister 'note' the decisions of the COSC (which she did on 13 March 2003).

The CDF did not:

a) recommend that the Minster agree to adopt the approach expounded by the COSC;

b) explain how that approach differed from that agreed by the Cabinet in 1993;

c) advise the Minister that Minister Scott had advised Cabinet in March 2000 that *the current set of objective criteria for assessment of 'warlike' and 'non-warlike' service ... provide the framework against which any further historic claims and all future service can be assessed;*

d) explain how and why the COSC approach led to a different conclusion to that of the Clarke Review in relation to each of the recommendations it opposed; or

e) offer any advice on how the COSC approach would allow resolution of the problem that would emerge if a retrospectively recognised misclassification of service could not be reclassified under subsequent legislative changes.

7.58. On **2 March 2004** the then Prime Minister, the Hon John Howard MP, announced the Government's response to the Clarke Review. This involved a package of measures in relation to veterans' entitlements, none of which was relevant for present purposes. What was of relevance, however, was the Prime Minister's statement that:

> *The Government will continue to provide special recognition and comprehensive assistance to those who have served Australia in times of war, at personal risk of injury or death from an armed enemy.*
>
> *In keeping with this approach, we have accepted the Clarke Report's recommendation that there be no change to the incurred danger test for Qualifying Service. However, we reject the view that this test has been interpreted too narrowly.* [107]

7.59. In more detailed speech on the same day, Minister Vale said:

> *Traditionally, Australia has provided a special level of benefit for veterans with* Qualifying Service *– that is, those who have faced the risk of personal harm from an enemy – as opposed to* Operational Service [108]

[107] Joint Press Conference-The Hon John Howard, PM, with the Hon Danna Vale MP, Parliament House, dated 2 March 2004.
[108] Ministerial Speech-The Hon Danna Vale, MP Minister for Veterans' Affairs,' Response to the Clarke Committee Report on Veterans' Entitlements', dated 2 April 2004, pp. 3-6.

Today, the concept of Qualifying Service *has been replaced by* Warlike Service*, defined as operations where the application of force is authorised for specific military objectives and where there is an expectation of casualties.*

…

So we endorse and accept the Committee' recommendation that there be no change in the statutory test for Qualifying Service.

However, we reject the Committee's view that the 'incurred danger test' has been interpreted too narrowly by the courts and administrators.

Public support and confidence in the generosity of our Repatriation System depends on the 'incurred danger test' remaining objective. We would create anomalies if we were to confuse a state of readiness, or presence in a former enemy's territory, with the real and tangible risks of facing an armed and hostile enemy. [109]

7.60. With that speech the Minister issued a comprehensive listing of the Government response to each of the 109 recommendations of the Clarke Review. The Government rejected six of the seven recommendations that had been opposed by the COSC, but accepted the seventh in principle. It rejected a greater number of other recommendations that had apparently not been the subject of consideration by the COSC. [110]

> There was nothing in the Prime Minister's announcement, Minister Vale's speech or the detailed statement of Government acceptance or rejection of the Clarke Review's 109 recommendations that amounted to an express or, in the view of the Tribunal, reasonably implied approval by the Government of the COSC view that reassessment of ADF service should be conducted by reference to legislation and policy applicable at the time of service as opposed to that applicable at the time of review.

7.61. On **18 August 2006** the recently formed RCB Review Group wrote to the then Minister for Defence, the Hon Dr Brendan Nelson MP, seeking 'warlike' classification for RCB service. That letter was passed to the then Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, for response. [111] Mr Robert Cross, who signed the letter to Minister Nelson in his capacity as Chairman of the RCB Review Group Committee, had previously made other ministerial representations seeking a similar outcome.

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[109] Ibid.
[110] Ibid.
[111] Letter, Mr Cross to Dr Nelson, dated 18 August 2006, Document number 134.

7.62. Mr Cross requested that a review be conducted to consider the relevant facts presented in an attachment to his letter which, he said, supported the claim that RCB service was warlike. He asked that, if that claim was substantiated, the Minister should approve:

a. Qualifying service for VEA;
b. Australian Active Service Medal (AASM) with clasp Malaysia;
c. Returned from Active Service Badge (RASB); and
d. General Service Medal 1962, with clasp Malaysia for those who served in RCB until 14th February 1975. [112]

The criticisms subsequently made in 2011 by Defence of Mr Cross' letter and particularly of the attachment to it are discussed below. But, because of those criticisms it is important that the Tribunal records its assessment of Mr Cross' documents.

His letter, while brief, addressed the core elements of the 1993 Cabinet-approved definition of 'warlike'.

His attachment drew heavily on contemporaneous and relevant official documentation that was, at least arguably, supportive of the claims he made.

And he addressed the findings of previous reviews and provided a rational and pointed critique of them.

In short, the Tribunal regarded the RCB Review Group submission to Minister Nelson as a thoroughly reasonable, rational and professional argument that warranted detailed consideration.

Whether the arguments advanced by the RCB Review Group (then and since) were correct and should now be accepted was the core issue for consideration by the Tribunal in this inquiry.

7.63. On **28 August 2007** the then Vice Chief of the Defence Force, Lieutenant General Ken Gillespie, provided a submission to Minister Billson. He recommended that the Minister not agree to a 'warlike' classification but, instead, agree that RCB service from 15 November 1970 to 6 December 1972 should be determined to be 'non-warlike' under the VEA and that RCB service from 7 December 1972 to 31 December 1989 should be determined to be 'hazardous' under the VEA. [113] He provided an attachment that set out the reasons underpinning this recommendation, and a draft response to Mr Cross. [114]

[112] Ibid.
[113] Ministerial Brief Vice Chief of the Defence Force to Minister Billson Ref B660823 dated 28 August 2007, included with Submission 96a, Department of Defence pp. 14-15.
[114] Ibid, pp. 16-21.

7.64. The attachment to the submission noted that the previous Mohr and Clarke Reviews had applied the Cabinet-approved 1993 definitions of 'warlike' and 'non-warlike' to ascertain the nature of operations conducted prior to those definitions being agreed, but stated that the Chiefs of Service Committee was not comfortable with that approach and that, on its advice, the CDF had directed that anomalies should instead be reviewed against the legislation and policy that was extant at the time of the operation. The attachment identified the Repatriation (SOS) Act as the relevant legislation and referred to the 1965 Interdepartmental Committee and Cabinet decision on allotment for special service under that Act. It then stated that *No evidence is provided of.... A specific request for the assistance of Australian forces ... where the task has been clearly defined ...' as required by the Cabinet Decision*.

7.65. The attachment then discussed the concept of 'incurred danger' and noted the recommendation of the Clarke review that neither 'warlike' nor 'non-warlike' service was rendered in Malaysia at Butterworth after the cessation of the Indonesian Confrontation. It expressed the view that it would be *inappropriate* to award the same level of benefit as 7 RAR which had numerous contacts with the enemy in Vietnam and sustained 16 killed in action and many more wounded at the same time as the initial RCB deployment. It also noted that 4 RAR service in Malaya after 14 September 1966 had been denied 'warlike' classification as it did not meet the Cabinet criteria, and that recent reviews of service in Korea after the Armistice in 1953 had not considered that service to be 'warlike'.

7.66. The attachment next discussed the definitions of 'hazardous' service in the VEA and the 1993 Cabinet Decision. It stated that:

> *30. ... The arguments tendered in the submission do indicate that service at the base during the period in question can be considered to be above and beyond normal peacetime service.*
>
> *...*
>
> *32. Arguments for hazardous service classification can be sustained for the RCB when compared with other more recent hazardous operations such as Operation BELISI in Bougainville in 2000 during which weapons were not carried by ADF personnel and Operation AZURE in Sudan in 2006 where the six UNMO op AZURE were also not armed.*
>
> *33. It is not unreasonable therefore, to declare the operations hazardous retrospectively pursuant to section 120 of the VEA. This would allow the more beneficial standard of proof to be applied to claims relation to service with the RCB.*

7.67. As to 'warlike' service, the attachment concluded:

> *34. There does not appear to be any specific request from the Malaysian authorities for the RCB to conduct operations against CT operating in the area of the Butterworth Airbase which was beyond the capacity of the Malayan forces to handle.*

There is also no evidence of any operations being conducted against the CT by the RCB. There is no record of the Butterworth Air Base being declared a special area during the period 1970 to 1989 and therefore there is no basis for allotting the RCB for special duty. The overall level of threat faced by the RCB is not considered to be such that their activities during the period in question warrant a warlike nature of service classification.

7.68. Finally, the attachment stated that *hazardous' service cannot be applied before 1972* and that prior RCB service would as a result have to be declared 'non-warlike' and that *Others who served directly in the defence of Butterworth Air Base (BAB) should similarly have their service considered as 'hazardous' or 'non-warlike'.* [115]

In the view of the Tribunal, there were problems with this submission and its attachments. They ranged from the relatively inconsequential to the fundamental.

The attachment stated that the Mohr Review had applied the Cabinet-approved 1993 definitions of 'warlike' and 'non-warlike' when in fact it had not done so and the Minister had been at pains to point that out to Cabinet and publicly. Nothing much turns on that error.

Far more fundamental, however, was the revelation that, with the advice of the Chiefs of Service Committee, the CDF had directed that anomalies should be reviewed against the legislation and policy that was extant at the time of the operation and not by reference to those definitions. This was a departure from the previous practice under which, as the attachment noted, *Recent reviews have taken the approach of applying the definitions or warlike and non-warlike service to operations that were conducted prior to those definitions being agreed by Cabinet in 1993*.

More fundamentally, it was contrary to clearly stated Cabinet and Ministerial decisions, detailed above, that perceived anomalies in the classification of ADF service were to be resolved by application of the 1993 definitions and that it was appropriate to apply modern criteria. Minister Vale's earlier noting of the COSC view in support of this approach did not amount to approval of it or elevate it to the status of Government policy. The VCDF did not explain why the 1993 Cabinet-approved definitions should not be applied, or why the 1997 Ministerial/Cabinet decision that *modern criteria* were to be appropriately applied in assessing future anomalies in classification was not being followed.

The Tribunal considered that it was not for the CDF to unilaterally discard or overturn the express definitions and process agreed by Cabinet and Ministers. If that was desired, the proper course would have been to seek Ministerial agreement, after Prime Ministerial consultation, to that course of action. In doing so, the Minister should have been expressly advised of the previous decisions and given a reasoned

[115] Ministerial Brief, Vice Chief of the Defence Force to Minister Billson Ref B660823 dated 28 August 2007, Attachment A paragraph 37a. Submission 96a, Department of Defence.

explanation of why an alternative approach should be adopted. The submission to Minister Billson did not do this.

The problems that arose from the application of this new approach, without alerting the Minister to its significant departure from that approved by Cabinet, are discussed below in the Tribunal's analysis of the letter to the RCB provided by the Minister on Defence advice.

7.69. On **18 September 2007**, in accordance with that Defence advice, Minister Billson signed two instruments under the VEA. The first determined that RCB service from 15 November 1970 to 6 December 1972 was 'non-warlike service'; [116] the second determined that RCB service from 6 December 1972 to 31 December 1989 was 'hazardous service'. [117]

In preparing these instruments for the Minister, Defence had acted on an assumption that 'hazardous' service could only be recognised from 7 December 1972 and not prior to that date and that it was accordingly necessary to recognise service prior to that date as 'non-warlike'. It is now accepted that this was not correct and that all RCB service could legally have been determined to be 'hazardous'. A 24 November 2011 Defence submission to the Minister accepted that this option had been open to the Minister.

Clearly, Defence was not under any misapprehension that, while the concept of 'non-warlike' service was only introduced into the VEA in 1997, there was a time limitation on what service could be recognised as 'non-warlike'.

It appears that Defence gave no consideration to why the entirety of RCB service should not have been determined to be 'non-warlike'. This was an available option and would have been slightly more favourable to RCB veterans than a 'hazardous' determination, as VEA eligibility for 'non-warlike' service extended to disability attributable to an occurrence during service whereas eligibility for 'hazardous' service required a more direct causative relationship to service.

These instruments were 'legislative instruments' to which the *Legislative Instruments Act 2003* (which was from 2012 retitled as the *Legislation Act 2003)* applied. Under then section 12(1)(d) of that Act, while validly made on 18 September 2007, the instruments would only come into effect at the start of the day after they were registered on the Federal Register of Legislative Instruments (which in 2012 became the Federal Register of Legislation).

Once made by the Minister, section 25 of the Act (now section 15G(1)) required that *the rule-maker must, as soon as practicable after making that legislative instrument, lodge the instrument in electronic form with the [Attorney-General's] Department for*

[116] Ministerial Determination of Hazardous Service, *Veterans' Entitlements Act 1986*, dated 18 September 2007. Submission 96a, Department of Defence, p. 26. Document number 150.
[117] Ministerial Determination of Non Warlike Service, *Veterans' Entitlements Act 1986*, dated 18 September 2007. Submission 96a, Department of Defence, p.27 Document number 150. SEE ABOVE

registration and section 26 (now section 15G(4)) provided that *the rule-maker must also lodge for registration, at the same time or as soon as practicable thereafter, the explanatory statement in electronic form that relates to that instrument*.

7.70. On **4 October 2007** Minister Billson wrote to Mr Cross in response to the RCB Review Group's submission of 18 August 2006 concerning 'warlike' nature of service classification for RCB service for the period 1970 to 1989. [118] This letter was in the terms of the draft that had been provided by the Vice Chief of the Defence Force on 28 August 2007. [119]

7.71 The Minister's letter referred to an assessment by Defence Nature of Service Review that related to repatriation entitlements under the Repatriation (SOS) Act and to Cabinet Decision 1048 of 7 July 1965. It described that decision in the following terms:

> *... the Services were directed that 'allotment for special duty' should only be made at a time when the personnel are exposed to potential risk by reason of the fact that there in* [sic] *a continuing danger from activities of hostile forces or dissident elements. Cabinet decided that allotment should therefore be confined to personnel specifically allotted for duty in relation to Indonesian infiltrators or communist terrorists in circumstances where there has been a specific request for the assistance of Australian forces and where the task has been clearly defined.* [120]

7.72. The Minister stated that:

> *The definitions of 'warlike' and 'non-warlike' were not introduced until May 1993. Defence considers it inappropriate to assess your claim against the 'warlike' and 'non-warlike' definitions as they were not in force at the time of the service under review.*

7.73. The Minister further stated that:

> *... your submission was assessed against the incurred danger test which is the fundamental concept underlying the award of the full package of veterans' entitlements. ... the key issue is a judgement on the extent to which RCB personnel were exposed to the risk of physical and mental harm and whether or not it was sufficient to justify allotment for special duty ... the Vice Chief of the Defence Force has advised that the extent of the danger incurred by the RCB during the period 1970 to 1989 was not sufficient to warrant allotment for special duty.*

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[118] Letter, Minister for Veterans' Affairs to Mr Robert Cross, dated 18 August 2006. Document number 126.
[119] Vice Chief of the Defence Force Ministerial B660832 to Minister Billson, contained in Submission 96a, Department of Defence.
[120] Letter, Minister Billson to Mr Cross, dated 4 October 2007. Document number 126.

7.74. The Minister stated that *the RCB was involved primarily in garrison duties and were not involved in the conduct of any operations* and noted that the Clarke review *found that the RCB's tasks were infantry training and after-hours patrolling of the perimeter of the base* and that *it is clear that training and protection of Australian assets are normal peacetime garrison duties*.

7.75. The Minister concluded by saying:

> *Having taken account of the advice from Defence as an outcome of their consideration of your submission, I am not prepared to overturn the advice from Defence nor the advice from the Clarke Review regarding 'warlike' service. The degree of exposure to the risk of harm was not sufficient to warrant the full package of repatriation benefits.*
>
> *However, the arguments tendered in your submission do indicate that service at the base during the period in question can be considered hazardous service. During the period 1972 to 1994 Defence personnel generally were eligible for veterans' entitlements as a result of continuous full time service for a period of three years, or two years as National Servicemen. ...*
>
> *I am prepared to declare retrospectively this period of service as hazardous pursuant to section 120 of the Veterans' Entitlement Act. This would allow the more beneficial standard of proof to be applied to claims relating to service with the RCB.*
>
> *The award of the Australian Service Medal will also apply to those who served at the Butterworth Air Base during the period in question.* [121]

The reasons provided by the Minister for denying recognition of RCB service as 'warlike service', which reflected the advice to him from Defence, were in the opinion of the Tribunal fundamentally flawed. And they were flawed on multiple bases.

The Tribunal did not necessarily take issue with the concept of assessing past service by reference to the legislation and policies of the time of service, rather than those of the time of assessment. But this approach would require that relevant legislation and policies be correctly identified, interpreted and applied. And limiting consideration to past legislation may not necessarily provide a definitive answer - for example, where a request is for an action under current legislation, such as that was made by the RCB Review Group. Legislation changes over time. A very significant example of that was the introduction of the reasonable hypothesis requirement in 1985, which meant that service that attracted benefits under previously applicable legislation did not necessarily qualify under later applicable legislation.

It is nevertheless to be questioned why repatriation legislation would be regarded as determinative of service classification. The 1993 Cabinet decision established a process

[121] Ibid.

whereby repatriation entitlements and medallic recognition followed on from the primary declaration of service classification. 'Reverse engineering' from repatriation legislation to service classification can produce perverse consequences. For example, there was a lag of some four years before the 1993 Cabinet decision was reflected in the VEA and yet it was clear that service in the interim was to qualify for the newly determined conditions of service and medallic recognition before the VEA was amended.

While it is true that the Repatriation (SOS) Act applied to provide repatriation benefits for the greater part of the period of RCB service, it was not the only Act that so applied. In the latter years, the VEA applied. The Defence advice and Minister Billson's letter did not provide any analysis of RCB service by reference to that other Act.

But, even if the Repatriation (SOS) Act were the only relevant Act, the service to which that Act applied was *warlike operations or state of disturbance*. This was the relevant nature of service that required consideration.

The question that should have been addressed was thus whether RCB service was provided in *warlike operations or state of disturbance*. Instead, the Defence advice focussed on allotment for service under that Act. The Tribunal has identified no evidence that Defence ever considered whether RCB service involved *warlike operations or state of disturbance* (either in preparing this advice to Minister Billson or in any subsequent advice provided to subsequent Ministers).

Allotment was not a nature of service. It was simply an administrative or bureaucratic device or process to distinguish those units or individuals who played a sufficiently significant part in an operation to render them deserving of repatriation benefits particular to that operation from those who, while they may also have played a part in the operation, were considered to be not so deserving. As noted above, the Interdepartmental Committee and the Cabinet had decided in 1965 that, where they were engaged in *warlike operations or state of disturbance,* the Services should allot *at a time when the personnel are exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces.*[122]

Applying this test, for example, the ADF member who assembled, packed and consigned weapons and ammunition in Australia for shipment to an overseas battleground would not be allotted even though their actions were inherently necessary for the conduct of the operation because they were not *exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces.* In contrast, the ADF member who loaded and discharged that ordnance in the face of the enemy clearly was intended to be allotted because they were *exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces.*

Further, as discussed above, the 1965 Cabinet decision did not mandate that allotment should only occur where operations were conducted in response to a request from a foreign government. The *present circumstances* to which the decision referred were the Indonesian Confrontation. RCB service was unrelated to the Indonesian Confrontation,

[122] Ibid.

so the test for allotment was simply whether RCB veterans were *exposed to potential risk by reason of the fact that there is a continuing danger from activities of hostile forces*, provided that RCB service was in fact classifiable as *warlike operations or state of disturbance*.

Moreover, while the Cabinet definitions of 'warlike' and 'non-warlike' were only adopted in 1993, there was nothing in them that relevantly limited them to being applicable only to service after that date. Clearly they were adopted to provide a mechanism for ready identification of conditions of service such as leave and allowances for service after that date, but there was no such limitation stated or necessarily implicit in relation to their application for the assessment of repatriation benefits and medallic recognition in relation to prior service. In the absence of any contemporary definition of 'warlike operations' from the period 1970 to 1989, the Tribunal considered that the 1993 definitions should have been seen as a useful guide to interpretation. Moreover, in 1997, the Minister and Cabinet had agreed that the application of modern criteria was appropriate and that they would be applied in considering any further historical anomalies and for all future service.

Finally, and quite fundamentally, the request made of the Minister by the RCB Review Group was for veterans' entitlements under the VEA and for medallic recognition under the Regulations governing the award of the Australian Active Service Medals. These requests, if they were to be met, could only be met under the legislation and policies applicable at the time of the Minister's decision. The outcome that might have pertained under previous law and policy could not be determinative of the RCB Review Group's request. That is self-evident when it is recognised that, had it been concluded that RCB veterans should have been allotted for what was belatedly recognised to have been *warlike operations or state of disturbance*, allotment would not have generated any entitlement under the VEA – a VEA ministerial determination of 'warlike' service would have been required and, under the 1993 Cabinet Decision, should only have been made if the 1993 definition of 'warlike' was met. And, clearly, allotment was not an eligibility criterion under the Australian Active Service Medal Regulations – the relevant criterion was 'warlike operation' and the applicable policy was the 1993 'warlike' definition.

This is not to say that the Minister should have accepted the request for warlike recognition. Rather, it is to say that the stated reasons for not doing so do not hold water.

Whether RCB service was in fact 'warlike' was the matter squarely raised in the current direction to the Tribunal.

7.76. On **3 December 2007** Mr Cross wrote to the then Minister for Defence, the Hon Joel Fitzgibbon MP, asking for a review of previous decisions in relation to the RCB Review Group claim. [123]

7.77. On **11 March 2008** Mr Cross wrote again to Minister Fitzgibbon stating that, as the RCB Review Group regarded Minister Billson's decision as not acceptable, they had sought FOI access to the NOSB advice provided to the Minister in relation to that decision but had received nothing despite six months having passed. He asked Minister Fitzgibbon to assist in providing access to that documentation. [124] The Tribunal did not identify any response to Mr Cross' letter.

7.78. On **4 April 2008** the then Minister for Defence Science and Personnel, the Hon Warren Snowdon MP wrote to Mr Cross in response to his letter of 3 December 2007. He said that the correspondence had been passed to him and advised Mr Cross that he had asked the VCDF to further investigate the claim but that a response was unlikely before 3 June 2008. [125]

7.79. On **27 August 2008** Minister Snowdon wrote again to Mr Cross in response to his letter of 3 December 2007. He said that:

> *The terms 'warlike' and 'non-warlike' were not introduced until 1993, and thus have no application to your case.*

7.80. He then stated that the legislation and policy applicable at the time of RCB service had been applied, that the applicable legislation was the Repatriation (SOS) Act, and that there had been no request from Malaysia for RCB assistance as required by the 1965 Cabinet decision.[126]

> The Minister's letter is subject to the same criticisms as set out above in respect of Minister Billson's rejection of the claim that RCB service was 'warlike'.

7.81. On **22 May 2009** Mr Cross wrote to Minister Snowdon asking if he had accepted Minister Billson's decision that he was *prepared to declare retrospectively this period of service and hazardous pursuant to section 120 of the VEA,* and noting that the RCB Review Group was preparing a detailed response to Minister Billson's rejection of the claim for classification of RCB service as 'warlike'. Further, he sought clarification of whether that declaration of hazardous service applied only to RCB members or also to RAAF personnel. [127]

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[123] Letter, Mr Cross to Minister Fitzgibbon dated 3 December 2007 Submission 66 Lieutenant Colonel Russell Linwood ASM (Retd) p. 6194
[124] Letter, Mr Cross to Minister Fitzgibbon, 11 March 2008, Submission 66 Lieutenant Colonel Russell Linwood ASM (Retd).
[125] Letter, Minister Snowdon to Mr Cross, dated 4 April 2008.
[126] Letter, Mr Cross to Minister Snowdon, dated 27 August 2008.
[127] Letter Mr Cross to Minister Snowdon dated 22 May 2009.

7.82. On **2 December 2009** Mr Cross wrote again to Minister Snowdon, noting that he had not received a reply to his letter of 22 May 2009. He added that the RCB Review Group had been advised that its 18 August 2006 submission would be reviewed by the Defence Honours and Awards Tribunal (as it then was) in 2010. [128]

7.83. After receiving Mr Cross' letter of 22 May 2009, Defence realised that Minister Billson's instruments of 18 September 2007 had not been registered as required under the *Legislative Instruments Act* and thus had not come into effect to confer the benefit intended by the Minister. It was also realised that there were some other issues with those instruments:

a) the instruments related only to RCB service, whereas Defence's intention had been that they should also confer benefit on the RAAF Airfield Defence Guards, Police and Security Guards who similarly contributed to airfield security at Butterworth;

b) the dates specified in the instruments meant that RCB service on one day was determined to be both hazardous and non-warlike; and

c) one of the instruments, while stated to be a determination under the VEA, did not specify the section of the VEA under which it was made, unlike the other instrument which did specify the relevant section. [129]

7.84. Defence then approached DVA to seek an estimate of the cost to add in the RAAF personnel in revised instruments that it planned to put to the Minister to correct those issues. [130]

7.85. DVA concluded that, contrary to Defence assertions, it had not been consulted about the cost of the original instruments in extending VEA benefits to RCB veterans. The issue was raised by DVA with the Repatriation Commission, with one option being to simply provide costing for the coverage of additional RAAF personnel so as to avoid potential embarrassment for the Government. However, Repatriation Commissioner Brigadier Rolfe instead wrote to Defence on **1 February 2010** expressing concern not only about the alleged failure of Defence to consult DVA about the cost of the original instruments providing VEA coverage to RCB veterans, but also about the very concept of providing such coverage at all. In so doing, he said:

> *... the Repatriation Commission does not see itself as having the role of 'second guessing' decisions regarding the nature of service classifications of Australian Defence Force (ADF) operations. These decisions properly sit with the leadership of the ADF. However, the Commission does not resile from its role of protecting the integrity of the repatriation system, and I am concerned that in this instance, on the*

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[128] Ibid.
[129] Determination of Non-Warlike Service, *Veterans' Entitlements Act 1986*, Rifle Company Butterworth, dated 18 September 2007. Submission 96 Department of Defence, p. 57.
[130] Submission 96a, Department of Defence.

evidence we have at hand, there appears to be little in the way of justification for the reclassification.

The Clarke Review examined this issue and observed that the RCB's tasks were infantry training and after-hours patrolling. Clarke commented that "…training and the protection of Australian assets are normal peacetime garrison duties", and recommended that no further action be taken. This recommendation was accepted by the then Government, and the issue is therefore outside the scope of the Ministers current revisitation of unimplemented recommendations.

…

I am anxious about the precedent that will be established through this reclassification, both for other like ADF activities and for other ADF personnel based at Butterworth during the same time. [131]

7.86. On **11 March 2010** the Parliamentary Secretary for Defence Support, the Hon Dr Mike Kelly AM MP, agreed that recognition of RCB service would be referred to the Defence Honours and Awards Tribunal (as it then was) for inquiry. [132]

7.87. On **14 May 2010** the then Minister for Veterans' Affairs and Minister for Defence Personnel, the Hon Alan Griffin MP, issued a media release announcing the outcome of an election commitment to further consider the recommendations of the Clarke Review which had not been acted upon by the previous Government. He said that *45 recommendations were revisited and carefully examined. Three have been accepted and already acted upon; four have been accepted; four deferred for further consideration; 22 referred to the review of Military Compensation Arrangements and 12 recommendations rejected*. None of the recommendations in question related to RCB service.[133]

7.88. On **18 February 2011** the Defence Honours and Awards Appeals Tribunal (as it had since become) provided the Parliamentary Secretary for Defence, Senator the Hon David Feeney, with the report of its *Inquiry into recognition for members of Rifle Company Butterworth for service in Malaysia between 1970 and 1989*. The report noted that, in its written submission and at its appearance before the Tribunal, the RCB Review Group had sought:

a. Qualifying service for veterans' entitlements;

b. Clasp 'MALAYSIA' to the Australian Active Service Medal (AASM);

c. Returned from Active Service Badge (RASB); and

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131 Submission 96a, Department of Defence.
132 Ministerial Submission A1263/23279 DHAT to Dr Kelly.
133 Media Release, Minister Griffin, *Government delivers response to Clarke Review of Veterans' Entitlements*, 14 May 2010.

d. Clasp 'MALAYSIA' to the General Service Medal 1962 for those who served in RCB until 14 February 1975. [134]

7.89. The Tribunal findings were that:

a. The service rendered by members of the RCB in the period 1970 to 1989 was properly recognised by the award of the Australian Service Medal (ASM) 1945-1975 with Clasp 'SE ASIA' or the ASM with Clasp 'SE ASIA';
b. The Tribunal has no jurisdiction in matters of veterans' entitlements and had no power to declare service as 'qualifying service' for the purposes of the VEA;
c. The Tribunal has no power to bestow eligibility for the RASB which is awarded automatically with the AASM 1945-1975 and with the current AASM;
d. The end date for eligibility for the General Service Medal 1962 with Clasp 'MALAY PENNISULA' (sic) *was 12 June 1965. No Clasp 'MALAYSIA' existed for this award. The Tribunal found no justification to recommend the extension of the end date or the creation of a new clasp; and*
e. There is no justification for extending the eligibility period for the Australian Service Medal with Clasp 'SE ASIA' beyond the current end date of 31 December 1989, which had been requested in one submission. [135]

7.90. Accordingly, the Tribunal recommended that no change be made to the medallic entitlements which were attached to service with RCB in the period 1970 to 1989 and that no change be made to the medallic entitlements which were attached to service with any other unit of the Australian Defence Force at Butterworth in the period 1970 to 1989 or since 1989.

7.91. The report stated the Defence position in the following terms:

33. The Department of Defence has consistently argued that there is no justification for any further award entitlement in respect of service with the RCB. This conclusion is based on advice in 2009 provided by the Nature of Service Review team which was tasked to examine the submission of the RCB Review Group when it was previously submitted to the Minister of Defence in 2006. The crux of the Department's position is that service with the RCB cannot be characterised as 'warlike' service, which is defined as a state of declared war, combat operations against an armed adversary and/or peace enforcement operations under Chapter VII of the United Nations (UN) Charter. The submission cites support for this position from the earlier findings of the 2003 Clarke Review of Veteran's Entitlements.

34. In its submission, the Department of Defence argues that: The Governor-General cannot declare an operation or Defence activity to be warlike for the purpose of the

[134] Report of the *Inquiry into recognition for members of Rifle Company Butterworth for service in Malaysia between 1970 and 1989*, Defence Honours and Awards Appeals Tribunal, 18 February 2011, Executive Summary, paragraph 5. Document number 124.
[135] Ibid, paragraph 10.

[AASM] *Regulations...without the Government first agreeing that the service is or was warlike in nature and the Minister has declared this to be the case under the* [VEA] *Act 1986. (Ref Defence submission)*

35. Defence does not support the upgrade of service with the RCB to warlike status and therefore does not support the award of an AASM.

7.92. The report summarised the evidence available to it but, in doing so, noted that *The evidence presented to the Tribunal by and on behalf of the claimants is not substantial*. It concluded that *The Tribunal could find no convincing evidence from the material submitted to it that RCB service was warlike.* It observed that:

Happily, no battle casualties resulted from service with the RCB and no armed encounter with any enemy force occurred. The documentation provided to the Tribunal by the Department of Defence and its own research officer indicates persuasively that there was no expectation of casualties when the decision to position a company at Butterworth was made, nor subsequently. [136]

It is apparent from the Tribunal's report that, while it was aware of the 1993 Cabinet-approved definitions of 'warlike' and 'non-warlike', it was unaware of the terms of the relevant Cabinet decision that common definitions should apply for terms and conditions of service, veterans' entitlements and medallic recognition. This may have influenced the fact that it did not consider how RCB service had been assessed under the VEA and whether that was relevant to its conclusions on AASM or ASM eligibility.

Nevertheless its finding that it had no jurisdiction in matters of veterans' entitlements and had no power to declare service as 'qualifying service' for the purposes of the VEA was undoubtedly correct.

Significantly, given the Tribunal's acknowledgement that *The evidence presented to the Tribunal by and on behalf of the claimants is not substantial*, its conclusion that RCB service was not 'warlike' was not viewed by the current Tribunal as decisive or determinative. In the current inquiry the volume of evidence adduced by RCB veterans and their representative bodies was far greater than previously, as was the breadth and depth of the Tribunal's own inquiries. Moreover, the Tribunal in focusing on the lack of casualties may not have given the requisite consideration to whether or not there was nevertheless an *expectation of casualties*.

[136] Ibid, paragraph 47.

7.93. On **17 May 2011** Parliamentary Secretary Feeney noted and accepted the Tribunal's findings,[137] and that decision was publicly announced by Defence on 26 July 2011.

7.94 On **25 July 2011** a Nature of Service Branch Background Brief stated that, because the Billson instruments had not been registered and were not legally enforceable, RCB service *has remained classified as peacetime service*. The paper stated as follows:

> *53. The role of the RCB was routinely peacetime training unless a security emergency was declared, and the GDOC activated, at RAAF Butterworth.*
>
> *55. ... NOSB examined all the Base Squadron Unit History Sheets for the period 1968 to 1986 and found no mention of an emergency activation.*
>
> *56. Further, the OAFH[138] advised that no record of any operational activation of the GDOC could be found in their records. This Office also advised that the GDOC was activated periodically for exercise and training purposes and, as a routine event, these training activations may not have been recorded in the history sheets.*
>
> *57. As the GDOC was never activated, the nature of service at Butterworth from 1970 to 1989 must have continually remained as peacetime service. Further, the continual existence of the contingency plan the Rules of Engagement and other associated security measures in the Op Order add no value to the claim for 'warlike' service by the RCB or any other ADF personal* [sic] *serving at Butterworth.* [139]

The paper made no reference of the fact that RCB service had been determined to be 'non-warlike' service under the ASM Regulations, a classification separate and distinct from 'peacetime' service.

More fundamentally, the paper made no reference to the 1993 Cabinet-approved and still extant definitions of 'warlike' and 'non-warlike' or, indeed, any other definitions of those terms or of the term 'peacetime'.

Had the paper considered the 'warlike' definition it would have been readily apparent that the decisive criteria were *military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties.*

Had the paper considered the 'non-warlike' definition it would have been readily apparent that the decisive criteria were *military activities short of warlike operations where there is risk associated with the assigned task(s) and where the application of force is limited to self defence.*

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[137] Ministerial Submission 2011/031807, Submission 96a, Department of Defence, Attachment G.
[138] The Office of Air Force History.
[139] Nature of Service Review Board 3-30 August 2011 DOC 2011/37- Background Brief- Rifle Company Butterworth – p.9 release under FOI 183/19/20.

Given that the paper acknowledged the risk to Butterworth from an attack by CTs and the RCB role in responding thereto, the Tribunal could not understand how the paper could have reached a conclusion of 'peacetime' service. The fact that an attack on Butterworth did not eventuate was not a decisive factor as the definitions were focussed on risk rather than result.

7.95. On **14 October 2011** the Defence Nature of Service Branch completed a review of RCB service that had been initiated in May 2011. It produced two papers, respectively headed *2011 Nature of Service Branch Review ADF Service at RAAF Butterworth – 1970-1989*[140] and *Background Information Paper nature of service Classification – ADF Service at RAAF Butterworth*. [141] These are discussed further below.

7.96. Defence sought legal advice about whether there was an obligation to register the instruments signed by Minister Billson in 2007. Defence Legal advised that Defence was not legally bound to register the documents but that it was possible to do so provided various administrative requirements were met. That was confirmed by an SES officer in the Office of Legislative Drafting and Publishing in the Attorney-General's Department, and the Defence General Counsel confirmed this to the Vice Chief of the Defence Force on **2 November 2011**. [142]

This legal advice appears to be strictly correct – the Department was not legally obliged to register the instruments. However, it seems that the advice addressed the wrong question. The *Legislative Instruments Act 2003,* as noted above, required that *the rule-maker must, as soon as practicable after making that legislative instrument, lodge the instrument in electronic form with the [Attorney-General's] Department for registration.*

That is, the registration obligation was imposed on the 'rule-maker' which was the Minister, not the Department.

The obligation to register required that lodgement for registration had to be effected *as soon as practicable after making*.

Allowing that the failure to register in 2007 was an inadvertent omission, the obligation to lodge *as soon as practicable* was nevertheless still extant and would seem to continue to this day, with the effect that successive Ministers have

[140] Paper, *2011 Nature of Service Branch Review ADF Service at RAAF Butterworth – 1970-1989*. Document number 3.
[141] Background Information Paper, *Nature of Service Classification – ADF Service at RAAF Butterworth*, Submission 96a, Department of Defence, pp.38-50.
[142] Correspondence, Defence Legal and Office of Legislative Drafting to VCDF dated 2 November 2011, Defence Ministerial - Snowdon/2011/MA11-001151, dated 24 November 2011, Submission 96a,Department of Defence, pp 51-54.

unknowingly been in breach of their statutory obligation under the *Legislation Act 2003* since 2007.

7.97. On **31 October 2011** the Hon Bruce Billson MP wrote to the then Minister for Veterans' Affairs and Minister for Defence Science and Personnel, the Hon Warren Snowdon MP. Mr Billson noted that he had received a copy of the 25 August 2001 Royal Australian Regiment Corporation representation to the Minister. He said:

> *My concern is that considerable time has elapsed since September 2007 that is unexplained. In the interim, rather than simply attending to alleged administrative deficiencies, the policy intention of the determination appears to have been revisited and revised without adequately ensuring that the interests of those former service personnel addressed (sic) by the original determination being (sic) preserved.*
>
> *Given the uncertainty and anxiety caused by the recent revelations, I ask that you give this matter early consideration and seek to uphold the clear policy intention of the September 2007 RCB nature of service determination in a way that does not disadvantage DVA clients in terms of repatriation benefits.* [143]

Defence then decided that, rather than secure registration of amended instruments, it would recommend to the Minister that the Minister should take no further action to implement Minister Billson's decision to confer VEA benefits on RCB veterans. [144]

7.98. On **24 November 2011** the then departmental Secretary, Major General Duncan Lewis (Retd) and the then CDF, General David Hurley, sent a joint submission to the then Parliamentary Secretary for Defence, Senator the Hon David Feeney. The principal recommendation of this submission was that *all ADF service at Butterworth from 1966 should remain classified as peacetime service*. The Parliamentary Secretary agreed with this recommendation and signed an attached draft letter to Mr Billson on **21 March 2012**.

7.99. The letter to Mr Billson stated that:

a) as the instruments he had signed were not registered, all service at Butterworth post Confrontation *remained classified as peacetime service*;

b) although the advice provided to Mr Billson at the time he signed those instruments was the best available at the time, *it has subsequently been shown to be inadequate and misleading*;

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[143] Letter, Hon Bruce Billson MP to Minister Snowdon, dated 31 October 2011, Submission 96a, Department of Defence.
[144] Submission 96a, Department of Defence.

c) *The evidence now available does not support the claim that RCB was an operational deployment and that its **primary** role was to protect Australian assets at Butterworth … the ready reaction and ground defence tasks were only **secondary*** (emphasis added);

d) the level of risk in RCB service *is not sufficient to meet the intent of hazardous service under section 120(7)* of the VEA and the CIDA and Clarke reviews came to a similar conclusion; and

e) *Notwithstanding this decision on the nature of service classification of peacetime service for all ADF service at Butterworth from 1966, eligibility for the award of the Australian Service Medal 1945-1975 or the Australian Service Medal will not be affected*. [145]

The Tribunal perceived considerable problems with the advice provided to Senator Feeney and, consequently, with the letter Senator Feeney wrote to Mr Billson.

The recommendation that RCB service *remain classified as peacetime service* [emphasis added] was simply wrong. It had been classified as 'non-warlike' under both the Australian Service Medal Regulations and the VEA. The fact that the Billson instruments had not been registered so as to come into effect did not change the fact that they classified RCB service as 'non-warlike' (or its 'hazardous' sub-element) rather than 'peacetime'.

If the desire was to 'undo' the 2007 Billson instruments, the appropriate course was for the Department to recommend to the Parliamentary Secretary that, in reliance on section 33(3) of the *Acts Interpretation Act 1901*, a written determination under the VEA should be made to *repeal, rescind, revoke, amend or vary* those instruments. This was a power that could only be exercised by a Minister and was not delegable to Defence.

The failure to make such a determination meant, in the view of the Tribunal, that the 2007 instruments remain legally valid today, even though they have not come into effect because of the failure to register them as required by the *Legislation Act 2003*. It also meant that, because Defence did not provide them with relevant administrative support to meet their obligations under that Act, Minister Billson and each of his successors have unknowingly been in ongoing breach of the registration obligations under that Act.

Beyond that fundamental issue, the Tribunal had concerns about other statements made in the submission to the Parliamentary Secretary and its accompanying documents insofar as they related to the characterisation of RCB service.

[145] Letter, Senator Feeney to Mr Billson dated 21 March 2012. Submission 96b Department of Defence, Attachment Q, pp 330-332.

First, the Parliamentary Secretary was not expressly alerted to the fact that, in accordance with advice from Defence to the Minister and from the Minister to the Governor-General, and consistently with the recommendation of the independent Mohr Review, RCB service had been declared to be 'non-warlike' under the Australian Service Medal Regulations and he was provided with no advice about whether or how that declaration could be rationalised against the 'peacetime' classification being recommended to him. The Tribunal considered that this was a major omission as the 1993 Cabinet decision stated that common definitions were to apply across terms and conditions of service, veterans' entitlements and medallic recognition.

Second, the Parliamentary Secretary was not specifically advised of the 1993 Cabinet-approved definitions of 'warlike' and 'non-warlike'. There was no assessment of RCB service by reference to those definitions. Instead, he was advised that RCB service classification should be assessed against the Repatriation (SOS) Act and the VEA (the latter being recognised, so far as the Tribunal has been able to ascertain, for the first time in ministerial briefing as being applicable during a part of the period of RCB service, but no analysis of how it applied to RCB service was included). The advice did not explain how those Acts could be interpreted to lead to a classification of 'peacetime' service. It also did not explain why it was not possible to classify RCB service as 'non-warlike' (or, indeed, 'warlike') under the legislation that applied at the time that the RCB veterans sought such recognition in 2006 and subsequently.

Third, the advice introduced a number of 'glosses' on the criteria for 'hazardous' or 'non-warlike' service that are unsubstantiated by the Cabinet decision or the legislation to which reference was made. For example, it said that 'hazardous' service had to be *substantially more dangerous* than 'peacetime' service, and it implied that the RCB's role of assisting in the ground defence of Butterworth had to be *its primary role* and an *operational deployment*.

As noted earlier, the Second Reading Speech and Explanatory Memorandum for the Bill that introduced the concept of 'hazardous' service provided no description of service that should be declared hazardous, but the 1993 Cabinet-approved definitions required that it only be service involving *a degree of hazard above and beyond that of normal peacetime duty*, with no adjective used to quantify the degree *above and beyond*. This suggestion that it needed to be *substantially* above and beyond had, so far as the Tribunal could ascertain, no validity. It seemed to reflect a similar assertion in a 1997 *Service Entitlement Anomalies Review Part 2* which stated that hazardous service had to involve *a degree of risk significantly over and above that of normal peacetime duties*. This is to be contrasted with Part 1 of that Service Entitlement Anomalies Review which correctly noted that hazardous service involved *activities which were not warlike in nature, but which involved more danger or hazard than normal peacetime operations*, without any adjectival multiplier. When requested by the Tribunal to provide any legislative, Cabinet or ministerial authority for the proposition that service had to be *substantially* more dangerous, Defence stated on 28 April 2023 that:

Defence acknowledge the use of 'substantially more dangerous than peacetime service' in submissions to Government and letters to individuals in the period 2011-2013. No information has been identified to explain why the term 'substantially' appeared in these documents.

It seemed to the Tribunal that, colloquially speaking, Defence had been 'making it up as it goes'.

The submission stated that a 2011 Defence review set out in attachments to it *assessed, from first principles, the reclassification of ADF service at Butterworth from 1970 to 1989 as hazardous service under section 120(7) of the Veterans' Entitlements Act is not supported by the available evidence.* [146]

However, the Tribunal considered that there are considerable problems with those attachments.

The first attachment, *2011 Nature of Service Branch Review ADF Service at RAAF Butterworth – 1970-1989* dated 14 October 2011, set out a detailed chronology of file papers relating to the purpose of RCB deployments. A consistent theme of these documents was that RCB deployments had three purposes: providing a real sense of ground presence in support of Malaysia, training, and additional security for Butterworth generally and more specifically for Australian personnel and assets. These three purposes were from time to time stated in slightly different terms and in different order – but the underlying sense remained the same. The report then concluded:

The review shows that the RCB was not intended to perform any operational activity at Butterworth, except to assist in the protection of assets and personnel, if necessary, in a shared defence emergency. [147]

This stated exception contradicted the statement in the submission that *The evidence now available does not support the claim that the RCB was an operational deployment.*

The attachment then explained the nature of the 'shared defence emergency' concept in which the RCB would be one of 12 ground defence force elements under the command of the RAAF's Ground Defence Commander. It said that:

It must be stated that the foregoing ground defence activities and responsibilities were only in place during a shared defence emergency at Butterworth. In that the Office of Air Force History has advised that, following issue of the Op Order, the GDOC was never activated due to a

[146] Defence Ministerial, Snowdon/2011/MA11-001151, dated 24 November 2011, Submission 96a, Department of Defence, p.9.
[147] *2011 Nature of Service Review of ADF Service at RAAF Base Butterworth 1970-1989* p.7, Document number 3.

> *shared defence emergency, then the nature of service at Butterworth must have remained as peacetime service subsequent to 8 Sep 1971.* [148]

This suggested that RCB service could not have been 'non-warlike' because the CTs did not attack the base. However, both the Cabinet-approved definitions and multiple other documents made it clear that it was the risk of attack that determined the characterisation of service, not necessarily occurrences of it.

The attachment concluded that:

> *Apart from the possible ground defence assistance tasking at Butterworth, no evidence has been found that has shown Government or ADF intent that the RCB should be involved in any operational activity on the Malaysian Peninsular – as no shared ground defence emergency was experienced at Butterworth, no ground defence assistance was required* [149]

The second attachment, *Background Information Paper Nature of Service Classification – ADF Service at RAAF Butterworth* dated 14 October 2011, stated that *it is policy that all submissions seeking review of a NOS classification of past operations are considered in the context of the legislation and policies that applied at the time of the operation under review*. It did not explain the origin of that policy, or how it deviated from the 1993 and 1997 Cabinet and ministerial decisions. As noted above, the genesis for this policy appears to have been a 19 February 2003 meeting of the Chiefs of Service Committee. Ministerial approval for that policy was not sought at the time and Minister Vale was asked only to *note* the view of the COSC.[150]

The attachment criticised the 2007 decision by Minister Billson, on the advice of the Vice Chief of the Defence Force, in the following terms:

> *It appears that the Defence review conducted in 2007 relied mostly on the information and claims contained in the RCB Review Group Submission. At best, the information provided by the RCB Review Group was selective and lacked objectivity. There is no clear evidence that the 2007 review sought to either corroborate or disprove the claims made by the Review Group. The 2007 review does not appear to have been based on detailed research, particularly in light of the many documents that have recently been discovered that tend to contradict much of the information and observations made in the earlier 2007 review and subsequent MINREP.* [151]

In assessing this apparently damning view of the 2007 submission, the Tribunal considered that it was pertinent to note that:

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[148] Ibid, p.9.
[149] Ibid, p10.
[150] Background Paper to Nature of Service 2011 Paper Parliament Petition dated 3 March 2014 on RCB Service 1970-1989, p.2, Document number 136.
[151] Ibid, p.21.

a) the Defence papers did not identify any incorrect statement by the RCB Review Group;
b) they did not state how the information provided by the Review Group was *selective* - they did not identify any relevant information that was omitted or any fact that would dictate a contrary conclusion– this appeared to be, colloquially, a classic case of 'the pot calling the kettle black';
c) they did not explain how the information provided by the Review Group *lacked objectivity* when it offered a view from veterans who were 'on the ground' in Butterworth;
d) they did not explain why the 2011 review was more objective, when it appeared that it was simply a desktop review of historical files and contained no analysis of the facts of service at Butterworth; and
e) they did not identify which documents contradicted the information and observations made in the 2007 review (and, indeed, the documents to which it referred actually confirmed that the RCB had an operational purpose of base defence).

The Tribunal found it startling that this Nature of Service Branch document, so apparently lacking in analytical rigour, can have been relied upon by Defence to traduce a view put to the Minister by the Vice Chief of the Defence Force.

Other problems with this attachment were obvious in the Tribunal's view. For example, it stated that:

> *It is of some interest that Justice Mohr did not make specific reference or recommendations regarding service by the RCB. Possibly this omission is an indication that he considered all service beyond 27 May 63 as not appropriate for further consideration.* [152]

However, as noted above, the Mohr Review quite clearly recommended that:

> *... members of the Army, Air Force and land based RAN personnel serving in the Far East Strategic Reserve for periods of 30 or more days be awarded the ASM 45-75 Clasp 'FESR' ...* [153]

Its assertion that *from 1966 all ADF service at Butterworth has been classified as peacetime service* was self-evidently wrong because it ignored both the Governor-General's declaration of RCB service as 'non-warlike' and Minister Billson's determination of it as 'hazardous' and 'non-warlike'.

The claim that RCB service did not meet the essential criteria for allotment for special duty under the Repatriation (SOS) Act was based on a misreading of that Act, which identified *warlike operations* rather than allotment as the relevant nature of service.

[152] Ibid, p.15.
[153] Review of Service Entitlement Anomalies in Respect of South East Asian Service 1955-1975, Chapter 3, p.34 Document number 133.

The statement that *operational risks associated with ADF service at Butterworth from 1970 to 1989 do not meet the level of risk required for reclassification as non-warlike service* appeared to be at odds with the 1993 Cabinet definition which specified only that 'non-warlike' service is *military activities short of warlike operations* and, for the 'hazardous' sub-category of 'non-warlike', involved simply *a degree of hazard above that of normal peacetime duty*.

The assertion that *the documentary evidence does not support the RCB Review Group claim that RCB was an operational deployment* appeared to be at odds with the acknowledgement that the RCB's ground defence role was detailed in the *Operational plans for the defence of Air Base Butterworth during the period 1970 to 1989.*

And again the attachments asserting that ground defence was not the 'primary' role of the RCB but only 'secondary' imported glosses that were not justified by the terms of the Cabinet-approved definitions.

In summary, the Tribunal concluded that the totality of the advice provided to Senator Feeney as Parliamentary Secretary was fundamentally flawed and that it should be of no persuasive force in the Tribunal's deliberations on the matters within its terms of reference.

7.100. On **19 May 2012** Senator Feeney wrote to Mr Cross of the RCB Review Group, essentially responding to Mr Cross' letter to Minister Snowdon of 22 May 2009.[154] Senator Feeney recounted the previous history, and particularly the signing of the Billson instruments, and said that:

a) the Defence advice provided to Minister Billson *has subsequently been shown to be inadequate and misleading*;

b) the RCB's *primary role was in fact to maintain a presence following the withdrawal of the British forces from South East Asia and to assist with the routine protection of Australian assets at Butterworth Air Base*;

c) *... inside the Base security and ground defence remained a RAAF responsibility. If RCB was required for ground defence it would be subordinate to RAAF command and operational requirements. In practice RCB was mostly involved in infantry training activities and the ready reaction and ground defence tasks were only secondary*;

d) *Hazardous service was introduced into legislation in 1985 in order to cover service that was substantially more dangerous than normal peacetime service*;

[154] Letter, Senator Feeney to Mr Cross, dated 19 May 2012, included in Submission 96b, Department of Defence, p. 4.

e) *For any ADF service at Butterworth from 1970 onwards to meet the original intent of hazardous service, the service would need to be shown to be 'substantially more dangerous than normal peacetime service' and 'attract a similar degree of physical danger' as 'peacekeeping service'. Peacekeeping service generally involves interposing the peacekeeping force, which may be unarmed, between opposing hostile forces. The immediate threat to the peacekeepers is by being directly targeted or by being caught in the crossfire of the opposing forces.*

7.101. On **3 March 2014** a petition bearing 2,193 signatures was submitted to the Commonwealth Parliament. It requested that the House of Representatives *recommend a review be undertaken to enable reclassification of service by the RCB 1970-1989 from peacetime to warlike and grant qualifying service for VEA entitlements and medallic recognition and have those serving in RCB at Butterworth Air Base declared under the Defence Act as an active service area.* [155]

7.102. Petitions must be certified by the Standing Committee on Petitions before they are presented to the Parliament. Accordingly, the Chair of that Committee wrote to the Minister for Veterans' Affairs seeking a submission in relation to the petition. The Assistant Minister for Defence, the Hon Stuart Robert MP, replied to that letter on **29 May 2014**. [156]

7.103. Minister Robert's letter said that:

> *... it is considered that the level of risk associated with Australian Defence Force service at Butterworth from 1966 (post Confrontation) does not justify a warlike classification. The RCB service is appropriately classified as peacetime service.*

7.104. In reference to submissions from RCB veterans, Minister Robert said:

> *Defence has examined all the claims made in the submissions and sought to validate the evidence provided. However, Defence assesses the information contained in the submissions to be selective and subjective. The submissions demonstrate a flawed understanding of the legislation, of the policies and processes governing overseas deployments and of Defence terminology.*
>
> *This is understandable as most of the claimants were junior in rank at the time of their respective deployments, many having only recently completed basic training. Defence contends that to ensure training conducted at Butterworth was as realistic as possible, the likelihood of hostile action may well have been overstated to the soldiers and this could explain the misconceptions about the role of the infantry company and the hazards faced.* [157]

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[155] Petitions presented to Parliament during the 44th Parliament of Australia, 2014.
[156] Letter, Minister Robert to Dr Dennis Jensen MP, dated 29 May 2014.
[157] Ibid.

7.105. The Minister asserted that the peacetime classification was consistent with a number of reviews (which are referenced in this chapter, including the Mohr Review and the previous Tribunal's inquiry).

7.106. Finally, the Minister attached a background paper which he said had been prepared by a senior research officer who had reviewed previous Defence reviews and extended the research previously undertaken and re-examined all submissions from claimants.

The Minister's statement that RCB service *is appropriately classified as peacetime service* was inaccurate and misleading. It again ignored the fact that RCB service had been declared 'non-warlike' under the ASM Regulations, a classification recognised by the still-extant 1993 Cabinet decision as quite separate from 'peacetime'. It similarly ignored the classification of RCB service as 'non-warlike' and 'hazardous' by Minister Billson whose instruments remained validly made even though not in effect because of the failure to register them as required under the Legislation Act.

The assertion that the evidence of RCB veterans was *selective* was never substantiated. Defence never identified any relevant information that was not included in those submissions but that was sufficiently material to lead to a different conclusion from that advanced by the veterans. Notably, in the present inquiry, with only irrelevant exception Defence did not challenge any of the factual assertions made by the scores of RCB veterans who made submissions to the Tribunal repeating, in large measure, what RCB veterans had been claiming for decades.

The criticism that the veterans' submissions *demonstrate a flawed understanding of the legislation, of the policies and processes governing overseas deployments* can be seen to be specious when, as demonstrated by the preceding analysis, it was Defence itself that had a flawed understanding of the relevant legislation and the policies laid down by Cabinet and various Ministers. To the extent that RCB veterans' submissions also fell into the same error, they were generally simply responding to Defence claims as to the relevance and operation of legislation and policies.

The implied criticism of submissions from RCB veterans on the basis that they were *junior in rank* failed to recognise that they were in fact 'on the ground' at Butterworth and recounting factual experience that Defence, in this inquiry, chose not to challenge.

The suggestion that the likelihood of hostile action had been overstated to make training more realistic was pure speculation and the Tribunal could find no evidence to support it in any of the material available to it. Defence was unable to produce scripts for relevant briefings to RCB members, and the accounts from RCB veterans of the briefings they received at Butterworth seemed to accord with the contemporaneous risk assessments (discussed later in this report) on the strength of which deployments were initiated and continued for 19 years.

The list of Australian reviews said to have found RCB service to be 'peacetime' was in clear error. The Mohr Review was of the opinion that service which included RCB service was 'non-warlike' and recommended that it be recognised by the ASM. The 2011 Tribunal inquiry, while it concluded that RCB service was not 'warlike', clearly stated that it *was properly recognised by the award of the Australian Service Medal (ASM) 1945-1975 with Clasp 'SE ASIA' or the ASM with Clasp 'SE ASIA'*, each of which can only be awarded for 'non-warlike' service.

7.107. The background paper provided to the Committee by Minister Robert[158] provided a detailed overview of the history of RCB deployments and the outcomes of previous reviews. It then purported to analyse RCB service by reference to the Repatriation (SOS) Act and the VEA and, for the first time, made reference to the 1993 Cabinet-approved definitions.

The paper's analysis by reference to the Repatriation (SOS) Act was, as on previous occasions, flawed as it proceeded on the basis that RCB service did not meet the 'essential criteria' for allotment because there had been no Malaysian Government requests to the Australian Government for military assistance after 14 September 1966, thereby perpetuating the misreading of the 1965 Cabinet Decision.

Its analysis of RCB service by reference to the VEA asserted without substantiation that hazardous service *was intended to cover service that was substantially more dangerous than normal peacetime service.* Defence conceded to the Tribunal that there is no authority for the proposition that hazardous service must be *substantially* more dangerous than peacetime service. The paper gave no other reason for the conclusion that RCB service *does not met the level of risk or exposure to harm associated with a classification of hazardous service.*

With respect to the 1993 definitions, the paper gave no reasons whatsoever for its bald assertions that:

a) *ADF service at RAAF Base Butterworth from the end of Confrontation in 1966 to the end of the infantry rifle company's quick-response role in December 1989 does not meet the essential criteria for reclassification as* warlike *service under the VEA*: and

b) *It is assessed that the operational risks associated with ADF service at Butterworth from 1970 to 1989 do not meet the level of risk required for reclassification as non-warlike service.*

[158] Background paper Parliamentary Petition dated 3 March 2014, Rifle Company Butterworth 1970-1989, prepared by Nature of Service Branch 28 April 2014 and presented to Parliamentary Petitions Committee on 16 June 2014, pp. 4-27.

The paper's assertion that *essentially from 1966 all ADF service at Butterworth has been classified as* peacetime *service* was incorrect, given the previous classifications of 'non-warlike' and 'hazardous' for the purposes of award of an Australian Service Medal and the VEA respectively.

It claimed that the information provided by the RCB Review Group that led to Minister Billson's 2007 decisions was *selective and lacked objectivity*. The Tribunal believed that bald assertion was unjustifiable, especially as the RCB Review Group's submission had been so heavily reliant upon official Defence and other Government documentation.

The paper criticised the 2007 Defence Review, saying that there was no evidence that it sought to either corroborate or disprove the claims made by the RCB Review Group and did not appear to have been based on detailed research and asserted that *many documents that have recently been discovered ... tend to contradict much of the information and observations made* in the Review. Despite making these extremely broad criticisms, the paper failed to identify any single recently discovered fact or document or research effort that would undermine the 2007 Defence Review and the Government decisions made in reliance on it.

Finally, the paper asserted that the review conducted by Defence for the purpose of generating the paper

> *... generates consistently and irrefutably that the roles of the RCB were to provide a ground force presence in Malaysia, to conduct training, to assist in the security of RAAF Base Butterworth if required and to provide a quick reaction force if required.*
>
> *Therefore, the present-day review conforms that service of all ADF personnel at RAAF Butterworth between 1970 and 1989 is appropriately classified as peacetime service.*

In the view of the Tribunal, the paper provided no analytical support for that proposition.

7.108. Minister Robert's letter and its attachment were the subject of discussion with the Committee and by the Committee with RCB Review Group representatives at Roundtables convened by the Committee on 29 October 2014 and 19 November 2014. The Chair of the Committee advised the House of Representatives of the Committee's consideration of the petition on 24 November 2014. In so doing he said:

> *The committee does not investigate details of petitions, grant petitioners' requests, make recommendations to the government on the topic nor advocate for petition outcomes. ... While the request in the petition was not granted as part of the petition process, the petitioners had the opportunity to have their say in a public forum, and*

the Australian public now has much more information available to it about both sides of the issue. [159]

7.109. On **11 May 2017**, in response to an application for review lodged by Mr Herbert Mitterer, the Tribunal decided to affirm a Defence decision not to recommend Mr Mitterer for the AASM. This decision was based on the fact that RCB service, on which Mr Mitterer's application for the AASM was based, had not been declared by the Governor-General to be a 'warlike operation' under the AASM Regulations. The Tribunal stated that, after considering the evidence and submissions put before it, it was not inclined to recommend that the Minister should recommend to the Governor-General that RCB service should be declared as be a 'warlike operation' under the AASM Regulations.[160]

> The decision to affirm the refusal to recommend Mr Mitterer for the AASM because RCB service had not been declared by the Governor-General as a 'warlike operation' was clearly correct.
>
> The further decision to not recommend that such a declaration be made was based on the assessment of the Tribunal as then constituted of the evidence then available to it, which it appears from the record of the decision, was shallow. While it was relevant to the matters to which the presently constituted Tribunal was directed to consider, it was in no way conclusive or binding.
>
> In this inquiry, the Tribunal based its conclusions in this report on the entirety of the evidence before it, which it appears was very significantly more detailed than that considered in the Mitterer review, and on its independent assessment of all that evidence.

7.110. On **23 November 2017** the CDF recommended that the Minister for Defence approve updated definitions *for the NOS classification categories to be applied to all future ADF operational service.* In doing so he said:

2. In 1993, Cabinet agreed to a framework which delivered a simple, coordinated procedure to establish conditions of service benefits for ADF members who served on ADF operations. The definitions agreed to in the 1993 Framework are included at Attachment A. Prior to the framework being adopted, benefits were determined in an ad hoc manner. Subsequently, on 13 May 1997 the VEA was amended to incorporate the terms warlike and non-warlike, and this was carried over into the MRCA.

3. The 1993 framework (warlike, non-warlike and peacetime) remains practical for classifying ADF operations, and has other government agency support. However, the

[159] Australian Parliament House, House of Representatives, proof petitions, statements, Dr Jensen statement 24 November 2014, Hansard page 7943.
[160] *Mitterer and the Department of Defence* [2017] DHAAT 12 (11 May 2017) paragraph 38.

guidance to Defence on how to assess NOS for ADF operations has been reviewed to ensure relevancy for future ADF operations.

4. On 14 June 2017, COSC considered proposed new NOS definitions (Attachment B). It is important to note that the new definitions do not alter the intent or direction provided by the 1993 definitions. They do, however, more clearly distinguish between the NOS classifications and will promote a better understanding that NOS decisions are based on the exposure to the risk of harm to ADF personnel from hostile forces, consistent with the historic basis for the provision of repatriation benefits.

5. As a consequence of this consultation, I have agreed that the revised definitions incorporate criminal elements as a component of hostile forces to reflect current and future threats to ADF personnel on operational service. Psychological harm is now explicitly included in the definition of harm to emphasise that the risk of harm from enemy forces extends beyond physical risks. The risk of psychological harm is considered during the NOS assessment process.

6. I am confident the proposed new definitions will support the integrity of the NOS framework and ensure the consistent, equitable and transparent NOS classification of future ADF operational service.

7. Subject to your approval of the new definitions, I have also agreed that the new definitions should only be applied to all future new ADF operations.

8. Legal advice has confirmed that there is no requirement for Cabinet endorsement of the proposed new definitions. However, in the interests of transparency, it is recommended that you consult with the Prime Minister on the updated definitions which will guide future NOS assessments. A draft letter to the Prime Minister is at Attachment C. [161]

7.111 **On 27 February 2018** then Minister for Defence, the Hon Marise Payne MP, approved the following 'updated' definitions:

The nature of service (NOS) classification expresses the extent to which ADF personnel deployed on an ADF operation, or on a third country deployment, in a specified area and within a specified timeframe, are exposed to the risk of harm[1] from hostile forces[2] as a consequence of executing the approved mission and tasks.

Peacetime

A **peacetime** *classification acknowledges that an element of hazard and risk is inherent to ADF service and that personnel are appropriately trained and*

[161] Ministerial MA17-003644, Review of Nature of Service Definitions, Attachment P to Submission 96b, Department of Defence.

compensated for their specific military occupation. Service on **peacetime** *operations is not the same as serving overseas on a posting or short-term duty.*

A **peacetime** *operation is an Australian Government authorised military operation or activity that does not expose ADF personnel to a Defence-assessed threat[3] from hostile forces.[4] Therefore, there is no expectation of casualties as a result of engagement with hostile forces. There may be an increased risk of harm from environmental factors consistent with the expectation that ADF personnel will from time to time perform hazardous duties.*

Non-warlike

Non-warlike *service exposes ADF personnel to an indirect risk of* **harm** *from* **hostile forces**.

A ***non-warlik****e operation is an Australian Government authorised military operation which exposes ADF personnel to the risk of* **harm** *from designated forces or groups that have been assessed by Defence as having the capability to employ violence to achieve their objectives, but there is no specific threat or assessed intent to target ADF personnel. The use of force by ADF personnel is limited to self-defence and there is no expectation of ADF casualties as a result of engagement of those designated forces or groups.*

Warlike

Warlike *service exposes ADF personnel to a direct risk of* **harm** *from* **hostile forces**.

A warlike operation is an Australian Government authorised military operation where ADF personnel are exposed to the risk of **harm** *from* **hostile forces** *that have been assessed by Defence as having the capability and an identified intent to directly target ADF personnel. ADF personnel are authorised to use force to pursue specific military objectives and there is an expectation of ADF casualties as a result.* [162]

> *1* Harm. *The NOS classification of ADF operational service is based on an assessment of the level of exposure to the risk of harm – both physical and psychological – from hostile forces, but not environmental factors which are recognised elsewhere in the ADF remuneration framework and the conditions of service package.*
>
> *2* Hostile Forces. *Hostile forces comprise military, paramilitary or civilian forces, criminal elements or terrorists, with or without national designation,*

[162] Definitions for Nature of Service Classification: Peacetime, Non-Warlike and Warlike. Document number 150.

that have committed a hostile act, exhibited hostile intent, or have been designated hostile by the Australian Government.

3 Threat Assessment. *For the purposes of the NOS definitions, the level of threat from hostile forces must be derived from an authorised assessment provided by the Defence Intelligence Organisation or Headquarters Joint Operations Command-J2.*

4 Terrorism. *A general threat of terrorism which does not specify a direct threat to ADF personnel does not predicate a higher NOS classification than peacetime. To classify an ADF operation as other than peacetime. To classify an ADF operation as other than peacetime based on terrorism, there must be a Defence identifies specific threat to the ADF presence.*

The CDF Minute expressly acknowledged that there is a three-tiered classification of service ('warlike', 'non-warlike' and 'peacetime') and that the 1993 Cabinet-approved definitions remained in force. It stated that:

> *The 1993 framework … remains practical for classifying ADF operations … the new definitions do not alter the intent or direction provided by the 1993 definitions. They do, however, promote a better understanding that NOS decisions are based on the exposure to the risk of harm to ADF personnel from hostile forces, consistent with the historic basis for the provision of repatriation benefits.* [163]

Notwithstanding that Cabinet expressly agreed that those definitions were to apply to each of conditions of service, veterans' entitlements and medallic recognition, the CDF proposed that the updated definitions should apply to only conditions of service and veterans' entitlements, leaving the 1993 definitions to apply to medallic recognition. No reason was offered for introducing this dichotomy, and this appeared to the Tribunal to be illogical.

Importantly, the CDF stressed that the new definitions were to apply only to future ADF operations. This meant that, in consideration of prior service, the 1993 Cabinet-approved definitions remained applicable. No reason was offered for this.

The CDF Minute offered some explanation for the changes proposed but it was not comprehensive. Importantly, it did not explain why the new definitions stated that there was no expectation of casualties in both 'non-warlike' and 'peacetime' operations, rather than maintaining the more nuanced and gradual recognition of increasing risk of casualties in the 1993 definitions, where 'warlike' carried such an expectation and 'non-warlike' acknowledged a possibility short of expectation. This appeared to the Tribunal to be a retrograde step in fostering a clearer understanding of the differences between the three classifications.

[163] Ministerial MA17-003644, Review of Nature of Service Definitions, Attachment P to Submission 96b Department of Defence (key point 3).

7.112. On **1 February 2019** the then Vice Chief of the Defence Force, Vice Admiral David Johnstone, provided a submission to then Minister for Defence Personnel, the Hon Darren Chester MP, who had met with representatives of the RCB Review Group on 27 November 2018.[164] Following that meeting, Minister Chester had met with the VCDF, during the course of which the Minister sought information about the Billson instruments and the subsequent decision of Senator Feeney that RCB service should *remain classified as peacetime service.* The submission stated that the Feeney decision *is supported by the evidence, and is consistent with the findings of independent reviews.*

7.113. Attached to the submission was a document referred to as *Defence Review of the decisions regarding the 2007 hazardous and non-warlike determinations for RCB service 1970 to 1989 (Black Review)*. That attachment set out a detailed chronology of relevant events from 2006 to 2013 which appeared to be generally factually correct – although it was not completely free of error: for example, it stated that the Mohr Review applied the 1993 Cabinet approved decisions of 'warlike' and 'non-warlike' when it did not in fact do so. It was critical of the 2007 paper on which Minister Billson relied in deciding to declare RCB service as hazardous on non-warlike. It stated that:

> *Beyond the reference to the arguments tendered by Mr Cross, there is no evidence provided in the background paper to support a hazardous classification. There is no evidence of any research being undertaken to validate the claims made by Mr Cross, or to determine an appropriate classification based on the official records.*
>
> *…*
>
> *… beyond stating that the arguments tendered by Mr Cross indicate that service at Butterworth during the period can be considered to be above and beyond normal peacetime service, there is no evidence provided in the background paper to support a hazardous classification.*
>
> *…*
>
> *[the 24 November 2011 submission to Senator Feeney recommending that RCB service 'remain classified as peacetime service'] noted that the 2007 Defence review relied on selective information provided in the RCB Review Group submission and carried out little objective research in relation to claims made … This statement is confirmed by current-day NOS research on the matter.*
>
> *…*

[164] Ministerial MS19-000009 dated 22 February 2019 VCDF Vice Admiral Johnson RAN to the Hon Darren Chester MP, Attachment B to Submission 96a, Department of Defence.

While the [attachment to that submission] is not as comprehensive as recent research undertaken by NOS and subsequent consideration of the research for this period of service, it nevertheless is sufficiently detailed to support the recommendation to PARLSEC that the 2007 decision be reversed and that the service remain classified as peacetime service. [165]

The Tribunal perceived significant problems with this attachment.

Like the 2011 Defence review:

a) it did not identify any incorrect statement by the RCB Review Group;
b) it did not state how the information provided by the Review Group was *selective* as it did not identify any relevant information that was omitted;
c) it did not explain how the information provided by the Review Group *lacked objectivity* when it offered a view from veterans who were on the ground in Butterworth; and
d) it did not explain why the Defence 2011 review was *sufficiently objective*, when it appeared that it was simply a desktop review of historical files conducted without any analysis of the facts of service at Butterworth.

Moreover, while the attachment asserted that there had been more recent research that corroborated the decision that RCB service should *remain classified as peacetime service*, it did not state what the detail of that research was – unless it was the details of additional correspondence with and from Ministers and MPs to which it referred, none of which the Tribunal viewed as probative in any sense.

And, in common with the other NOS papers referred to elsewhere, it failed to mention:

e) the 1993 and 1997 Cabinet decisions;
f) the unilateral Defence departure from those decisions without informed Ministerial briefing or concurrence; or
g) that the Mohr Review had recommended and Cabinet had decided (as recommended by Defence) that RCB service was 'non-warlike', which Cabinet had defined to include 'hazardous' service.

[165] Ibid.

7.114. On **5 March 2019**, at a meeting with the VCDF, Minister Chester requested a copy of correspondence sent by him and Senator Feeney. [166] On **22 March 2019** Defence provided a submission to Minister Chester to which correspondence issued by Minister Chester and Senator Feeney was attached, together with a draft letter to Mr Cross. This correspondence comprised:

a) Senator Feeney's letter to Mr Cross of 19 May 2012, discussed above;

b) a 6 February 2013 letter from Senator Feeney to Senator Ronaldson, which included the statement that *at no time following the Confrontation ceasefire on 11 August 66 did the Malaysian Government request further ADF operational assistance in internal security operations. Consequently, although Australian forces remained in Malaysia, they were not involved in operations and, thus, rendered only peacetime service in Malaysia after 11 August 1966.*;

c) a 4 December 2013 letter from then Parliamentary Secretary Chester to Mr Cross responding to a letter from him dated 19 September 2013 – Mr Chester's letter included the statement that *No evidence was found to support the claim that RCB was an operational deployment and that its primary role was to protect Australian assets at the Butterworth Base*;

d) a 4 December 2013 letter from Parliamentary Secretary Chester to a correspondent, which included the statement that *under the VEA, hazardous service (for service before 1997) and warlike or non-warlike service, require a declaration by the Minister for Defence under the respective provisions of the Act, where such service is more dangerous than peacetime service and involving the use of force and the risk of casualties*;

e) letters of the same date and in generally similar terms to two other correspondents;

f) a not dissimilar letter of 12 December 2013 to a further correspondent;

g) a 16 July 2014 letter from Mr Chester to Mr Cross, responding to an email of 3 March 2014, which referred to the 2014 NOS report prepared in response to the petition tabled in the Parliament and stated that it *confirms that the service of all Australian Defence Force personnel at RAAF Base Butterworth during the period 1970 to 1989 is appropriately classified as peacetime service*. Mr Chester ended his letter by saying *I now consider this matter to be closed and advise that no further correspondence on this matter will be entered into.* [167]

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[166] Ministerial MS19-000484, Commodore RJ Bolton, RAN, dated 22 March 2019, Attachment R to Submission 96b, Department of Defence.
[167] Ibid.

7.115. The attached draft letter to Mr Cross was prepared in response to an email dated 5 December 2018 and a letter dated 21 February 2019. It included the following statements:

> *The ...letter signed ... on your behalf states that the Review Group has come to the conclusion that the fundamental obstacle to RCB service during this period being classified as warlike, is the fact that the Australian Government does not acknowledge the existence of a war or an emergency in Malaysia during the period. To clarify, the existence of a war or emergency in Malaysia would be incidental to the consideration of your claim for reclassification of RCB service. Importantly Australian Defence Force (ADF) personnel were not engaged in combat operations during the period in question.*
>
> *...*
>
> *Government did not prescribe a special area for any ADF service in Malaysia after the end of the Confrontation. ...*
>
> *It follows, therefore, that ADF service in Malaysia after the end of Confrontation cannot be considered to be warlike service.* [168]

7.116. Defence advised the Tribunal that it had found no documents recording further action by Minister Chester following receipt of the minute of 22 March 2019 and its attached draft letter. [169]

7.117. On **24 October 2019** Minister Chester wrote to Senator Katy Gallagher in response to a letter she had written to him on behalf of a constituent in relation to the classification of RCB service. In his letter, Minister Chester said in relation to the ASM awarded for RCB service:

> *While the Instruments signed by the Governors-General are for 'non-warlike operations it is within the specific context to the medal regulations which state the ASM may be awarded for service in, or in connection with, prescribed non-warlike operations. In the context of the ASM Regulations, the use of the term 'non-warlike' is descriptive and means other than, or not, warlike. Accordingly, the ASM can be and has been awarded for peacetime service.* [170]

So far as the Tribunal was aware, this was the first occasion on which a Minister had asserted that 'non-warlike' meant 'other than warlike' in the context of medallic recognition.

[168] Ibid.
[169] Ibid.
[170] Defence Ministerial MC19-002244 dated 24 October 2019.

The Defence minute providing the draft of this letter for Minister Chester's signature, which was cleared by the Acting CDF, stated that:

a) *the use of the term 'non-warlike operation' in the Declaration and Determinations for the Australian Service Medal and the Australian Service Medal 1945-1975 refers to operations that are not 'warlike';* and

b) *The ASM may be awarded for service in, or in connection with, a prescribed non-warlike operation. In the context of the ASM Regulations, the use of the term 'non-warlike' is descriptive and means other than, or not, warlike. Accordingly, the ASM can be and has been awarded for peacetime service.*[171]

The first of these statements was simply incorrect – the relevant documents made no such reference.

The second statement was made without any authority the Tribunal was able to identify. It was contrary to the 1993 Cabinet-approved definitions and not supported, as claimed by Defence, by Minister Scott's June 2001 approval of the paper *ADF Medals Policy – Where We Have Been and Where We Are Going* which the Tribunal analysed in detail above.

Shortly stated, the Tribunal considered that Minister Chester was wrongly advised and his signing of the letter containing those errors could not be viewed as a properly informed endorsement of them.

Moreover, the statement that the ASM had been awarded for 'peacetime' service may not be reliable given that, in the view of the Tribunal, Defence had wrongly classified RCB service as 'peacetime' when it was clearly at least 'non-warlike', as discussed later in Chapters 16 and 17.

7.117. On **14 May 2020**, in response to an application for review lodged by Mr Raymond Fulcher, the Tribunal decided to affirm a Defence decision not to recommend him for the AASM. This decision was based on the fact that RCB service, on which Mr Fulcher's application for the AASM was based, had not been declared by the Governor-General to be a 'warlike operation' under the AASM Regulations. The Tribunal further decided that it would not recommend that the Minister should recommend to the Governor-General that RCB service should be declared as be a 'warlike operation' under the AASM Regulations. This second decision was based on its conclusion, after considering the evidence available to it, that:

> *54. The Tribunal thus does not accept that a 'state of war' extended to the Australian situation, despite the challenges and ambiguities inherent in the ADF presence at Butterworth between 1970 and 1989. It is of the view that the conditions there fit the ... description of 'hazardous' and 'non-warlike', as well as the 2018*

[171] Ibid.

definition of 'non-warlike', and were thus more than normal peacetime service, but do not satisfy the definition of 'warlike' in relation to medallic recognition.

55. The Tribunal is of the view that the ASM with 'SE ASIA' clasp is appropriate for recognition for the service of RCB, RAAF and other ADF personnel at Air Base Butterworth during a period in which the Australian presence provided an important contribution to the stability of Malaysia and Singapore when those nations faced many challenges in a developing, but uncertain strategic environment. The medal and clasp should be worn with pride, particularly by those members who contributed directly to the security of the base and the continuing safety of Australian civilian and military personnel. [172]

The decision to affirm the refusal to recommend Mr Fulcher for the AASM because RCB service had not been declared by the Governor-General as a 'warlike operation' was clearly correct. The further decision to not recommend that such a declaration be made was based on the assessment of the Tribunal as then constituted of the evidence then available to it. As with the earlier 2017 Mitterer decision, it was in no way conclusive or binding on the Tribunal in this inquiry. The Tribunal based its conclusions in this report on the entirety of the much more detailed evidence before it, and on its independent assessment of all that evidence.

7.118. On **7 April 2022** the then Minister for Defence Personnel and Veterans' Affairs, the Hon Andrew Gee MP, issued the direction requiring the Tribunal to conduct the present inquiry. [173]

7.119. On **24 February 2023**, in a submission in relation to an application for review seeking the award of the AASM for service unrelated to RCB service, Defence stated:

> *Defence maintains that the definitions of "warlike", "non-warlike" and "peacetime" service used for nature of service and veterans' entitlements purposes do not apply to the terms in the regulations relating to Defence Honours and Awards. A decision on the classification of nature of service of an Australian Defence Force (ADF) operation does not necessarily mean the award of a medal would flow as a natural consequence or vice versa.* [174]

[172] *Fulcher and the Department of Defence* [2020] DHAAT 08 (14 May 2020) paragraph 55.
[173] Letter, the Hon Andrew Gee MP to Mr Stephen Skehill, Chair of the Defence Honours and Awards Appeals Tribunal, dated 29 March 2022.
[174] See *Murray and the Department of Defence [2023] DHAAT 7 (4 May 2023)*

The second sentence above was undoubtedly correct. A nature of service declaration by the Minister gives rise to entitlements to conditions of service such as leave and allowances but it does not confer any entitlement to a medal, for which a separate decision is required under the applicable medal regulations. And the converse applies – a decision to confer a medal does not give rise to an entitlement to conditions of service.

The first sentence, however, was quite different. Moreover, it extended far beyond the contention previously advanced by Defence that, for medallic recognition purposes, 'non-warlike' means 'other than warlike' and does not bear the meaning ascribed in the 1993 Cabinet decision. Defence had not previously contended that the 1993 definition of 'warlike' did not apply in the context of medallic recognition.

In this inquiry the Tribunal examined in some considerable detail Defence arguments of relevance. The Cabinet decision of 1993 clearly decided that uniform definitions of 'warlike' and 'non-warlike' were to apply to each of conditions of service, veterans' entitlements and medallic recognition. There has been no subsequent Cabinet decision that has changed that position. Defence argued that the then Minister's approval of the 2001 *ADF Medals Policy – Where We Have Been and Where We Are Going* paper had that effect but the Tribunal's analysis of that paper set out above rejected that argument.

Defence offered in that submission no authority or argument in support of the assertion in the first sentence. Significantly, in contending that the 1993 definitions were inapplicable, it suggested no alternative definitions of 'warlike' or 'non-warlike' that should apply in the context of medallic recognition.

Accordingly, the Tribunal afforded no weight at all to this most recent statement from Defence.

Conclusions

7.120. Having reviewed and analysed the history of previous consideration of RCB service in considerable detail as discussed above, the Tribunal concluded that:

a) The reasons given by the CIDA, Mohr and Clarke Reviews and the 2011 Tribunal inquiry for deciding that RCB service was not 'warlike' were not sufficiently detailed or supported by evidentiary analysis to allow this Tribunal to regard them as conclusive or even as strongly influential in its present consideration of that question.

b) The decisions to award an Australian Service Medal were rationally made and for apparently sound reasons after both external and internal reviews by appropriately qualified individuals who judged RCB service to be 'non-warlike'.

c) The reasons advanced by Defence and adopted by Minister Billson for rejecting the claim that RCB service was 'warlike' were fundamentally flawed.

d) The decision by Minister Billson to declare RCB service as 'non-warlike' or 'hazardous' under the VEA was recommended at very senior levels in Defence who had available for consideration relevant information and presumably gave detailed attention to it. While the resultant submission to Minister Billson did not include a clear or detailed analysis of the available facts by reference to the 1993 Cabinet-approved definition of 'non-warlike', that did not mean that the Minister's decision was wrong. The fact that the instruments prepared for and signed by the Minister were not well drafted did not deprive them of the ability to give effect to the intent of Minister Billson's decision, at least insofar as RCB veterans were concerned.

e) The failure to register the Billson instruments promptly after they were made was apparently nothing more than an unfortunate oversight. However, once that failure was realised and it became apparent that DVA would not stand quietly by and allow revised instruments to be made and registered to give effect to Minister Billson's decision, Defence changed its initial predilection to do so and asserted that the arguments it had put to Minister Billson were incorrect. Defence failed to recommend that the Minister take appropriate legal action to 'undo' the Billson instruments and thereby left the then Minister and subsequent Ministers in inadvertent breach of the statutory obligation to register those instruments.

f) Defence unilaterally decided to not apply the 1993 Cabinet-approved definitions and subsequent Ministerial and Cabinet decisions that they be used in reconsideration of claimed anomalies in service classification, and developed a new (and unsatisfactory) approach of its own without clearly briefing Ministers on how that departed from what had been previously agreed at the highest levels of Government and without seeking their express approval for that changed approach. The policy of considering retrospective reclassification of ADF service by reference to the legislation and policies applicable at the time of that service rather than those applicable at the time of consideration has never been the subject of informed Cabinet or ministerial decision, approval or consent in response to a detailed, analytical submission advancing reasons for the adoption of such a policy. While a number of Ministers since 2006 have signed numerous letters asserting that such was the policy, in contrast to the position approved by Cabinet in 1993 and subsequent ministerial advice to Cabinet, ministerial signature of such letters cannot, in the Tribunal's view, be regarded as informed consent.

g) The reasons that Defence advanced to Ministers to support its assertion that RCB service was 'peacetime' were fundamentally flawed and failed to alert Ministers to the incompatibility of that assertion with the previous and unchallenged decision to recognise RCB service by medals that can only be awarded for 'non-warlike' service.

h) The Defence contention that 'non-warlike' means *other than warlike* in the context of medallic recognition cannot be sustained. The reasons provided to Minister Chester when he signed a letter including that contention were clearly wrong and without foundation. No Minister has ever been provided with a detailed, analytical and unambiguous submission advancing reasons for adopting a definition of 'non-warlike' other than the 1993 definition in the context of medallic recognition.

i) The Defence contention that to qualify as 'hazardous', service must be *substantially more dangerous than normal peacetime service* has no legislative or Cabinet authority and contradicts the 1993 Cabinet-approved definition. The fact that a number of Ministers have signed letters repeating that contention cannot, in the Tribunal's view, be regarded as reflecting informed ministerial consent for the contention because no Minister has ever been provided with a detailed and analytical submission seeking approval of that deviation from the definition approved by Cabinet in 1993.

j) Successive papers generated by Defence prior to and after the commencement of this inquiry to support the proposition that RCB service was 'peacetime' did not withstand detailed analysis.

k) Whether or not RCB service was 'peacetime', 'non-warlike' or 'warlike' therefore remained an open question. The Tribunal therefore addressed that issue as set out in the balance of this report.

l) The 1993 Cabinet-approved definitions of 'warlike' and 'non-warlike' (and inferentially of 'peacetime') represent the only extant guidance provided by Government as to the way in which those terms should be interpreted in exercising the discretions conferred in the ASM and AASM Regulations and the VEA for service during the relevant period and thus should be adopted by the Tribunal.

m) While the 2018 updated definitions are, in their terms, inapplicable to historical service or to medallic recognition, the Tribunal nevertheless considered it appropriate to give some (albeit limited) consideration to them when seeking to apply the 1993 definitions because, as the CDF then advised the Minister, while the 1993 framework remained practical for classifying ADF operations *the new definitions do not alter the intent or direction provided by the 1993 definitions.*

Chapter 8 Veterans' submissions

Submissions from individuals

8.1. The Tribunal received 243 submissions from 148 individuals. The great majority of these were from RCB veterans. However, a small number were from RAAF veterans. Generally, these latter submissions sought to argue that RAAF personnel who had undertaken security-related duties at ABB should receive the same recognition as RCB veterans. Some however simply provided support for the RCB submissions from the perspective of their RAAF duties.

8.2. Most of the submissions from individual RCB veterans recounted the personal experiences of the author during their RCB deployment. It is significant that these individual RCB veteran submissions came from a broad spectrum of those whose rank while on RCB service ranged from Private to Company Commander. Moreover, a significant number of those who had RCB service subsequently had extensive and more senior ADF experience after their time at Butterworth and were thus able to bring an even broader perspective to their views on the nature of RCB service.

8.3. With only one exception, all RCB veterans argued for greater recognition, usually mentioning both Australian Active Service Medals and veterans' entitlements. Most did not provide detailed arguments about how relevant eligibility criteria supported those claims. Many of those who did include such arguments tended to repeat arguments that had been advanced over time by the organisations representing RCB veterans, principally the RCB Review Group. As discussed below, those arguments generally and very understandably focussed on and sought to rebut the reasons provided by Defence for rejecting the claims for 'warlike' service. Because Defence reasons were, in the view of the Tribunal, often irrelevant or unfounded, the Tribunal concluded that the purported rebuttals inadvertently failed to establish the case sought to be made.

8.4. The far greater significance and value of these individual submissions was, however, the insight which they offered into what actually happened on RCB deployments. This they did at a level of detail that was unable to be gleaned from the nonetheless extensive research conducted over time by RCB veterans' representative organisations and, during the course of this inquiry, by the Tribunal and Defence. There was a high degree of consistency in the assertion of these experiences, across many topics including but not limited to:

a) Deployment Preparedness Level 1 (DP1) status as a precondition to RCB deployment;
b) the requirement to have a current will or to acknowledge a personal choice not to do so;
c) the content of pre-deployment briefings;
d) the content of arrival briefings;
e) the content of periodic briefing updates during deployment;

f) the application of summary military discipline processes while on deployment;
g) the recording of disciplinary action taken by annotation of files with the terms 'Whilst on War Service' or 'WOWS';
h) the frequency of Quick Reaction Force (QRF) duty on deployment;
i) the occasions on which the Ground Defence Operations Centre (GDOC) was said to have been activated;
j) the issue of live ammunition;
k) the degree of weapon readiness beyond 'load';
l) Rules of Engagement (ROE);
m) the nature of any internal training undertaken while on deployment;
n) the lack of combined training with Malaysian Forces; and
o) the nature of duties undertaken away from Air Base Butterworth.

8.5. Despite that high degree of consistency, it was also apparent (and clearly reinforced by the oral testimony provided at the hearings in Brisbane on 3 and 4 April 2023) that there were some significant differences in practices and procedures as between the various RCB deployments over time. For example, there seemed to have been some difference in practices amongst deployments in relation to the state of weapons readiness when the QRF was called out, and as to the briefings that were provided on the terms and conditions contained in the ROE applicable from time to time. Given that there were more than 70 RCB deployments over a period of almost 20 years, this is hardly surprising. Changing perceptions of the risk of threat from CT attack over time may explain some of these differences; a less rigorous compliance with mandated rules may explain others.

8.6. Despite these differences, however, the Tribunal concluded that they were not so significant as to mean that RCB service should be differentially classified at different times over the period 1970 to 1989.

8.7. By and large the individual submissions argued against the Defence claim that RCB service was 'peacetime' and detailed the differences between their experiences on ordinary duty in Australia and that undertaken on RCB deployments. While these submissions then claimed that, because RCB service was not 'peacetime' service, it must therefore have been 'warlike', it was apparent that almost all of the authors saw this as a binary choice and did not contemplate the intermediate possibility that RCB service might instead have been 'non-warlike'.

8.8. It is of particular significance that Defence, when asked by the Tribunal, did not require any RCB or RAAF veteran to be called to give evidence on oath or affirmation or to be subjected to cross examination by it as to the accuracy of the facts asserted by the veteran. [In so doing, of course, it was made clear that Defence would not be taken to have conceded any of the arguments that submitters sought to base on the factual assertions they made]. Defence challenged only two of the asserted occurrences on RCB service. These were isolated instances concerned with a propounded interrelationship between RCB service and the war in Vietnam.

The RCB representative groups accepted the Defence rejection of these claimed incidents, and the Tribunal regarded their rejection as having no bearing on the weight otherwise to be afforded to the facts asserted by the RCB veterans.

8.9. Because of this, the Tribunal made its assessment of RCB service based on the uncontested assertions of fact put forward by RCB veterans. Chapters 16, 17 and 18 contain detailed analysis of those facts in the context of the various possible classifications of ADF service.

10. At the hearings in Brisbane on 3 and 4 April 2023, neither the RCB representative groups nor Defence argued that any uncontested assertion of fact unequivocally supported their respective arguments in favour of 'warlike' or 'peacetime' service. In colloquial terms, none of the uncontested assertions of fact was considered to be a 'silver bullet' that excluded a contrary conclusion.

8.10. The Tribunal noted that a small number of the individual submissions[175] referred to ADF service in Malaysia that was apparently not RCB service as such - for example service with Malaysian forces on the Thailand/Malaysian border. As this inquiry is limited to RCB service, the Tribunal has not explored whether or not any such service would qualify these individuals to any medallic recognition additional to that afforded to RCB service. However, those veterans might like to make application to the Directorate of Honours and Awards in Defence to ascertain whether they have any such entitlement.

8.11. Additionally, one submission[176] appeared to suggest that, while the author served with RCB, he had not received his ASM. If that is correct, the author could also make application to the Directorate.

Submissions from RCB representative organisations

8.12. The initial submissions by the RCB representative organisations drew generally on the assertions of fact made by individual RCB veterans and focussed more directly on the arguments the organisations advanced in favour of these claims. Significantly, these arguments were to a great degree reactive to the arguments that had, over time, been advanced by Defence and conveyed by Ministers in rejecting those claims. As discussed in Chapter 7, many of the Defence arguments hitherto advanced were wrong or irrelevant. To the extent that RCB organisations very understandably focussed on such arguments (on occasions making telling points against the Defence position), they were largely irrelevant. Importantly, the initial submissions from the RCB organisations did not approach the issues before the Tribunal from the perspective of the 1993 Cabinet-approved definitions. This was, of course, because they were never drawn to their attention as Defence had not referenced them in its prior consideration.

[175] See submissions 10, 18, 75, 116 and 126.
[176] See submission 42a.

8.13. Subsequent submissions, addressing issues raised by the Tribunal either at the pre-hearing meeting of 11 October 2022 or at public hearings, were more focussed on what the Tribunal viewed as relevant considerations and were thus of greater relevance and assistance to the Tribunal.

8.14. The RCB Review Group's initial submission[177] focussed on:

a) the New Zealand reclassification;
b) the Repatriation (SOS) Act and allotment;
c) the 1965 Cabinet decision;
d) 'incurred danger';
e) ROE;
f) the QRF role; and
g) a second Malaysian emergency.

8.15. Subsequent submissions were lodged by the RCB Review Group on 23 August 2022[178], on 19 September 2022[179], on 21 November 2022[180], on 23 January 2023[181], on 3 April 2023[182], on 8 May 2023[183], on 12 May 2023[184], and on 10 July 2023[185].

8.16. The Australian Rifle Company Group Veterans 1970 - 1989 initial submission[186] was largely a collation of historical documents relevant to the threat to Air Base Butterworth and Rules of Engagement.

[177] Submission 65.
[178] Submission 65a (in rejoinder to the initial Defence submission of 6 July 2022).
[179] Submission 65b (jointly with the RCB Veterans' Group, in response to the list of preliminary issues issued by the Tribunal after the pre-hearing meeting of 11 October 2022).
[180] Submissions 65c (in relation to the 1993 Cabinet decision) and 65d (in response to a Defence submission of 18 November 2022 in relation to previous reviews of RCB service).
[181] Submission 65e (in relation to expectation of casualties).
[182] Submissions 65f (concerning official awareness of the threat to RCB), 65h (a copy of an 8/9 RAR individual DP1 Checklist), and 65j (a copy of a PowerPoint presentation tendered at the public hearing of 4 April 2023).
[183] Submission 65g (concerning Defence Submission 96d).
[184] Submission 65i (four papers on various issues).
[185] Submission 65k (concerning classification of OP CATALYST)
[186] Submission 79.

8.17. Subsequent submissions were lodged by that Group on 12 August 2022[187], on 30 November 2022[188], on 15 December 2022[189], on 29 January 2023[190], on 29 January 2023[191], on 28 January 2023[192], on 16 April 2023[193] on 26 April 2023[194], and on 30 April 2023.[195]

8.18. To the extent to which these submissions by the RCB representative groups advanced arguments of relevance to the claim that RCB service was 'warlike', they are dealt with in Chapters 16, 17 and 18.

8.19. Over and above the arguments advanced in these various submissions by the RCB representative organisations, they frequently contained historical documents of relevance that were not otherwise available to the Tribunal and were thus of considerable benefit to the conduct of this inquiry.

8.20. In this latter regard, it is appropriate that the Tribunal recognise the submission of Lieutenant Colonel Russell Linwood ASM (Retd)[196] covering his extraordinarily extensive collation and indexation of historical documentation of relevance.

8.21. Finally, the Tribunal noted that a not-insignificant number of the submissions received from RCB veterans or the organisations representing them went beyond arguing against the Defence position that RCB service was 'peacetime' and very directly attacked the integrity of the Department of Defence and of its officers. A number of submitters also claimed that, in its conduct before the Tribunal, Defence had failed to comply with its obligations under the Commonwealth's model litigant principles.

8.22. For this reason, it is important that the Tribunal state in the clearest of terms that it considered these attacks to be unwarranted and misplaced. The Tribunal had no reason to doubt that, corporately and individually, Defence approached the question of classification of RCB service with integrity and in good faith. While it is apparent, from the views set out in Chapter 7 and elsewhere in this report, that the Tribunal considered that Defence made multiple errors in its analysis and decisions, that implies nothing adverse to the ethical position of those involved.

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[187] Submission 79a, in relation to the threat at ABB.
[188] Submission 79b, in relation to expectation of casualties and other service awarded the AASM and claimed to be comparable to RCB service.
[189] Submission 79c, in relation to expectation of casualties.
[190] Submission 79d, in relation to the likelihood of casualties.
[191] Submission 79e, in response to documents submitted to the Tribunal by Defence on 15 December 2022 in relation to policy on the grant of the ASM.
[192] Submission 79f, providing another collation of historical documentation.
[193] Submission 79g, concerning anticipated levels of threat.
[194] Submission 79h, an intended final submission to the inquiry, concerning several salient issues.
[195] Submission 79i, an addendum to submission 79g.
[196] Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

8.23. So far as Defence's model litigant obligations are concerned, these are set out in Appendix B to the *Legal Services Directions 2017* made by the Attorney-General under section 55ZF of the *Judiciary Act 1903*. They apply in the conduct of litigation, defined as *proceedings before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes, and the preparation for such proceedings*. They also apply to merits review proceedings. They are clearly applicable to that aspect of the Tribunal's work that involves merits review of applications for review lodged following Defence decisions refusing to recommend the award of a medal. But the *Defence Act 1903* draws a distinction between that work and the Tribunal's role in the conduct of inquiries such as the present which does not involve merits review as such. Whether the present inquiry falls within the definition of 'litigation' is not certain but, even if it does, the Tribunal did not consider that Defence had failed to comply with any specific obligation set out in the Directions. The fact that the Tribunal reached, for reasons set out in this report, conclusions that rejected various submissions by Defence or that were critical of its failure to provide information that the Tribunal did not have the power to compel should not be taken as implying the contrary.

Chapter 9 Defence submissions

9.1. The initial Defence submission was provided on 6 July 2022. In summary, it made a number of points which are listed below together with commentary by the Tribunal:

a) The effect of the New Zealand Reassessment was to align New Zealand with Australia in respect of New Zealand service at Butterworth that was similar to RCB service and did not recognise that New Zealand service as 'warlike'.

This issue is discussed in Chapter 10.

b) RCB service does not, in the view of Defence, meet the 'warlike' threshold for the AASM/AASM 1945-1975.

This issue is discussed in Chapter 18.

c) Defence and successive Australian Governments have consistently held that Australian Defence Force service at Butterworth between 1970 and 1989, and since that time, is appropriately classified as peacetime service.

This is simply incorrect. It ignores the fact that:

a. on 21 March 2000 Cabinet agreed that service including RCB service up to 30 October 1971 should be declared a 'non-warlike operation';[197]

b. on 19 July 2000 Defence recommended to the Minister Assisting the Minister for Defence that the Minister should recommend to the Governor-General that RCB service from 30 October 1971 to 1975 should be declared a 'non-warlike operation';[198]

c. on 23 March 2001 the Governor-General, on the recommendation of the Minister, declared service including RCB service up to 30 October 1971 to be a 'non-warlike operation';[199]

d. on 10 April 2001 Defence recommended to the Minister that the Minister should recommend to the Governor-General that RCB service from 30 October 1971 to 1989 should be declared a 'non-warlike operation'; [200]

[197] Cabinet Decision, JH00/0088/CAB, *Review of Service Entitlement Anomalies in Respect of South East Asian Service 1955-1975*, Submission 96b, Department of Defence.
[198] Submission 96a, Department of Defence.
[199] *Declaration and Determination under the Australian Service Medal 1945-1975 Regulations*, Commonwealth of Australia Gazette No. S102, 27 March 2001.
[200] Submission 96a, Department of Defence.

e. on 18 April 2001 the Minister recommended to the Governor-General that RCB service from 1971 to 1989 should be declared a 'non-warlike operation';[201]

f. on 8 June 2001 the Governor-General declared that RCB service from 1971 to 1989 was a 'non-warlike operation';[202]

g. on 28 August 2007 Defence recommended to the Minister for Veterans' Affairs, the Hon Bruce Billson, that RCB service should be determined to be 'non-warlike service' or 'hazardous service' (a subset of 'non warlike service' under the definitions agreed by Cabinet in 1993) for the purposes of the VEA;[203] and

h. on 18 September 2007 Minister Billson, for the Minister for Defence, determined RCB service from 15 November 1970 to 31 December 1989 to be either 'non-warlike service' or 'hazardous service' for the purposes of the VEA.[204]

d) The existing awards of the Australian Service Medal 1945-1975 with Clasp 'SE ASIA' and the Australian Service Medal with Clasp 'SE ASIA' provide appropriate recognition of Australian Defence Force service at Butterworth.

Given that an Australian Service Medal can only be awarded for 'non-warlike' service and that Defence claimed that RCB was 'peacetime service', the positions advanced by Defence were, on their face, mutually inconsistent. When challenged on this, Defence sought to argue that its positions were not inconsistent because, in the context of medallic recognition, 'non-warlike' meant 'other than warlike'. This proposition was considered in detail in Chapter 7 and in the Tribunal's view was incapable of substantiation. There is no legislative, Cabinet or informed ministerial decision to that effect. It was clear to the Tribunal that the 1993 Cabinet-approved definition of 'non-warlike' continues to apply for all pre-2018 service for the purposes of each of conditions of service, veterans' entitlements and medallic recognition, and for medallic recognition of post-2018 service.

[201] Submission 96a, Department of Defence, p. 4.

[202] *Declaration and Determination under the Australian Service Medal Regulations*, Commonwealth of Australia Gazette No S230 dated 29 June 2001.

[203] Ministerial Brief, Vice Chief of the Defence Force to Minister Billson Ref B660823 dated 28 August 2007, included with Submission 96a, Department of Defence pp. 14-15.

[204] Ministerial Determination of Hazardous Service and Non-Warlike Service *Veterans' Entitlements Act 1986*, dated 18 September 2007. Document number 150.

e) The CIDA Inquiry did not consider that service at Butterworth was clearly and markedly more demanding than peacetime service.

The Tribunal's assessment of the CIDA view is set out in Chapter 7 – in short, the Tribunal does not consider it determinative of the issue.

f) The Mohr Review recommended that FESR RCB service be recognised by the ASM 1945-1975 and this was agreed by Government.

Given that the ASM 1945-1975 could only be awarded for 'non-warlike' service, this confirmed the mutual incompatibility in the Defence submission referred to above.

g) while service at Butterworth in Malaysia was one of the specific areas of Australian Defence Force service the [Mohr] review was directed to advise on, the Review did not make specific reference or recommendations regarding service by the infantry rifle company or any other Australian Defence Force elements serving at Butterworth after 1966.

This observation may be technically correct, but is both misleading and irrelevant. The Mohr Review made a clear recommendation that *Army, Air Force and land-based RAN personnel serving with FESR for periods of 30 days or more be awarded the ASM 1945-1975 with Clasp 'FESR'*. This recommendation was interpreted at the time by Defence and accepted by the Government as including RCB service.

h) The Mohr Review recommended that, in considering overseas service generally, no further action be taken to reclassify deployments overseas to take part in exercises, or for extended periods of garrison type duty with associated training, which do not involve any hazard outside of normal peacetime training in Australia.

The Tribunal considered this observation to be irrelevant because the Mohr Review did recommend that service including RCB service be reclassified, and because (for reasons detailed later in this report) RCB deployments cannot be accurately described as *to take part in exercises, or for extended periods of garrison type duty with associated training, which do not involve any hazard outside of normal peacetime training in Australia*.

i) The Clarke Review found that RCB service was not 'warlike' because "it could equally well have been performed as part of peacetime activities in Australia".

As explained in Chapter 7, the Tribunal regarded that Review's reasoning as carrying no relevant weight.

j) The subsequent 2020 Defence follow on review recommended and the Government agreed that all other RCB service to 1989 be recognised by the ASM 1945-1975/ASM.

Given that these medals could only be awarded for 'non-warlike' service, the Tribunal considered that this too confirmed the mutual incompatibility in the Defence submission referred to above.

k) The 2011 Tribunal Inquiry into recognition of RCB service and the Tribunal review in the Mitterer and Fulcher cases each concluded that RCB service did not meet the 'warlike' eligibility criterion for award of the AASM/AASM 1945-1975.

The present Tribunal's assessment of those views previously expressed by it is set out in Chapter 7. Again, the Tribunal did not consider them to be determinative of the issue.

l) RCB service was not conducted under the Repatriation (SOS) Act.

For the reasons set out in Chapter 7, the Tribunal considered this to be largely irrelevant because it failed to address the question raised by the terms of reference – can RCB service be properly classified as 'warlike' under the present Regulations governing the award of the Australian Active Service Medals and under the VEA? Moreover, the Tribunal considered the Defence position on this issue involved a fundamental misreading of the 1965 Cabinet decision on 'allotment'.

m) an Australian Defence Force operation classified as peacetime service for nature of service purposes can also be considered for medallic recognition. There are numerous cases of peacetime service receiving medallic recognition, for example, the current Operation RESOLUTE is recognised by the Australian Operational Service Medal – Border Protection and previous service retrospectively recognised with the Australian Service Medal 1945-1975 and the Australian Service Medal.

There is no question that 'peacetime' service can be awarded medallic recognition – the eligibility criteria for various medals, including the Australian Operational Service Medal, do not limit award to 'non-warlike' or 'warlike service'. But the criteria for the ASM and the ASM 1945-1975 are limited to 'non-warlike' service and the statement that these medals have been awarded for 'peacetime' service, if correct, could suggest issues of systemic concern beyond the consideration of RCB service. However, the fact that Defence has, in the Tribunal's view, wrongly classified RCB service as 'peacetime' suggests that the assertion by Defence that the ASM and the ASM 1945-1975 have been issued for 'peacetime' service may well not be correct. As noted above and in Chapter 7, there is no legislative, Cabinet or informed ministerial decision that, in the context of medallic recognition, 'non-warlike' means 'other than warlike'.

n) Defence Honours and Awards medallic regulations have two classifications: 'warlike prescribed operations' and 'non-warlike prescribed operations'. There are three nature of service classifications" warlike, non-warlike and peacetime service.

This is simply incorrect. Relevantly, Defence honours and awards regulations recognise three categories – 'warlike', 'non-warlike', and 'service' without regard to whether or not it is 'warlike', 'non-warlike' or 'peacetime'. The 1993 Cabinet decision recognised three categories of service which were to be commonly-defined for the purposes of each of conditions of service, veterans' entitlements and medallic recognition. The 2018 definitions updated the 1993 definitions only for post 2018-service and only for conditions of service and veterans' entitlements. The 1993 definitions thus remain applicable for medallic recognition and veterans' entitlements for service pre-2018.

o) For nature of service purposes Rifle Company Butterworth service is classified as peacetime service. The following facts are taken into consideration:

- ***a. The Malaysian Government did not request military assistance, nor was assistance offered by the Australian Government throughout the entire 1970-1989 period.***
- ***b. The activities of communist terrorists in Malaysia throughout the period have been found to be incidental to Australian Defence Force personnel at Butterworth and did not characterise Australian Defence Force service in Malaysia.***
- ***c. The Malaysian Government never declared a 'Second Emergency' due to the communist terrorist threat. The Malayan Emergency of 1948-60 was marked by a formal Government declared Emergency.***
- ***d. Since the end of the Indonesian Confrontation in 1966, the Malaysian government has never again requested Australian Defence Force assistance in relation to either internal or external contingencies.***
- ***e. The Joint Intelligence Organisation (now known as the Defence Intelligence Organisation) continually assessed the threat level as low for Butterworth over the period in question.***
- ***f. The roles of the rifle companies which rotated through Butterworth were to provide a ground force presence in Malaysia, to conduct training, to assist in the security of the airbase, and to provide a quick reaction force if required.***
- ***g. Hansard states the purpose and roles for Rifle Company Butterworth rotations, which confirms they were not to be used for any security operations outside the airbase without government approval. The Rifle Company Butterworth was not authorised to become involved in internal Malaysian affairs.***

h. ***No record, or other evidence can be found that the infantry rifle company was ever required in an emergency ground defence capacity other than for exercise purposes.***

i. ***There are no documented attacks against the Butterworth airbase for the period, under consideration, and no related casualties.***

For the reasons set out in Chapters 7 and 11, the Tribunal considered paragraphs a., b., c. and d. as simply irrelevant. Whether the remaining paragraphs e. to i. justify a conclusion that RCB service was not 'warlike' is considered in detail in Chapter 18.

9.2. Defence provided additional submissions on 16 November 2022, 31 January, and 2 and 28 April 2023. These were predominantly responses to requests by the Tribunal for information or access to other historical documents. As appropriate, these were provided to the RCB representative organisations and published on the Tribunal website.

9.3. Noting that Defence had never conducted an assessment of RCB service by reference to either the 1993 Cabinet-approved definitions of 'warlike' or 'non-warlike' or by reference to the 'updated' 2018 definitions of 'warlike', 'non-warlike' and 'peacetime', the Tribunal requested that Defence undertake such an assessment and provide it to the Tribunal. The Defence assessments, provided in its supplementary submission of 31 January 2023, are reproduced at Appendix 6 and are the subject of detailed analysis in Chapters 16, 17 and 18.

9.4. In response to suggestions from the Tribunal at the hearing of 23 November 2022 that the initial Defence submission was internally inconsistent in asserting that RCB service was appropriately classified as 'peacetime' while at the same time appropriately recognised by the Australian Service Medals as 'non-warlike', Defence made a number of submissions in purported rebuttal. On 31 January 2023 and at the hearings in Brisbane on 3 and 4 April 2023, it sought to claim that, in the context of medallic recognition, 'non-warlike' meant 'other than warlike'. Those various submissions were silent on the question of whether or not the term 'warlike' bore the 1993 Cabinet-approved meaning in the context of medallic recognition.

9.5. However, on 28 April 2023, Defence went much further and submitted as follows:

> ***Defence's view, as detailed in previous submissions, remains that the 1993 Cabinet definitions for "warlike" and "non-warlike" do not apply directly to the terms within the medal regulations.***
>
> ***The suggestion that Cabinet intended that the 1993 definitions of "warlike" or "non-warlike" were to be applied directly to and/or operate as an independent test for consideration of whether an operation was to be recommended for a medal, is not in Defence's view supported by:***
>
> > ***• the use of the discretionary term 'may be recommended' in the column 'Medals' in the table at attachment D of the 1993 Cabinet document;***

• the contents, recommendations and outcomes of CIDA, Mohr and Clarke reviews subsequent to 1993;

• Government's 2001 approval of the ADF Medals Policy and in particular the conditions for the award of the Australian Service Medal including where there was no declaration of "non-warlike";

• evidence of successive Government's recommendations to the Governor-General for medal declarations for "non-warlike" service where there was no nature of service classification (nor an independent assessment of service against 1993 definitions) or a classification of "peacetime"; and/or

• the process and practice followed by Defence to consider medallic recognition, the outcomes of which have been presented to and accepted by successive Governments.

The assessment and classification of nature of service occurs prior to or shortly after the commencement of an ADF operation. It may change during the deployment. However, consideration for medallic recognition only occurs at a later date and ultimately is a discretionary decision based on consideration of multiple relevant factors. [205]

9.6. This was a more far-reaching assertion than that previously made by Defence in that it sought to disapply to medallic recognition not only the 1993 definition of 'non-warlike' but also that of 'warlike'. Given that the appropriate definition of 'warlike' was at the heart of this inquiry, it was essential that the Tribunal consider very seriously this particular assertion. Having done so, the Tribunal concluded that it was without any probative force.

9.7. In response to the above points which Defence cited in support of its contention, the Tribunal noted that:

a) the use of the discretionary term 'may be recommended' in the 'Medals' column in the table at Attachment D of the 1993 Cabinet document simply reflects that all Defence medals are awarded in exercise of the discretion and not because the applicable regulations create any enforceable entitlement. Even where the applicable eligibility criteria are met, there may be countervailing considerations why a medal should not be awarded to a particular individual, such unrelated criminal or otherwise despicable conduct. The term 'may be recommended' in a Cabinet submission that specifically recommends that medal recommendations *will be aligned with* the recommended definitions cannot be claimed to support an argument that those same definitions are inapplicable in the medallic context;

[205] Submission 96d, Department of Defence.

b) the content and recommendations of the CIDA, Mohr and Clarke reviews either do not address the 1993 definitions or make no suggestion for any change to them or offer suggestions for alternative definitions;

c) the outcomes of the CIDA Inquiry included the creation of the ASM 1945-1975 which hinged on the term 'non-warlike' and there was no suggestion that it was to bear any meaning other than the 1993 definition;

d) a clear outcome of the Mohr review was a specific statement by the Minister to Cabinet that the 1993 definitions would be applied in the resolution of future claimed anomalies, including in relation to medallic recognition;

e) there was no apparent outcome of the Clarke review that suggested the 1993 definitions were to be inapplicable in the context of medallic recognition;

f) as discussed in detail in Chapter 7, the Minister's approval of the 2001 paper *ADF Medals Policy – Where We Have Been and Where We Are Going* involved no change to the 1993 definitions and was so confused and confusing that, in the view of the Tribunal, it cannot be accepted as informed approval of the proposition that, in the context of medallic recognition, 'non-warlike' meant 'other than warlike'. The paper did not address the meaning of 'warlike' at all;

g) the suggestion that there have been recommendations to the Governor-General for recognition of service as 'non-warlike' where there was no nature of service classification (nor an independent assessment of service against the 1993 definitions) or where there had instead been a classification of 'peacetime' was far from conclusive of anything. It may be that service so recommended would have met the 1993 definition of 'non-warlike' had it been properly assessed and that a 'peacetime' classification was simply in error (as the Tribunal believed the more recent Defence classification of RCB service to have been for the reasons set out later in Chapters 16 and 17). Regardless, this factor cannot affect the ongoing applicability of the 1993 definition of 'warlike';

h) so far as the *process and practice followed by Defence to consider medallic recognition* are concerned, the Tribunal noted that the analysis in Chapter 7 showed that there had been no properly informed Cabinet or Ministerial decision that the 1993 definitions should not apply in the context of medallic recognition, and thus such cannot be inferred in Government acceptance of whatever may have been put to it by Defence; and

i) while medallic recognition may be considered after service rather than before or during it, that is no reason why that recognition should not be focussed on the prospective forecast of risk and associated likelihood of casualties to which the 1993 definitions are directed, rather than an outcome that has become apparent after the passage of time to which the definitions do not refer.

9.8. It is highly significant that in asserting that the 1993 definitions of 'warlike' and 'non-warlike' do not apply in the context of medallic recognition, Defence never suggested what alternative definition should be applied by the Tribunal in its consideration of the core issue raised in this inquiry – should RCB service be recognised as 'warlike' and attract the award of an Australian Active Service Medal.

9.9. The Tribunal therefore considered that it was clear that, in the absence of any properly informed and considered Government decision to the contrary, it was incumbent on it to address the issues raised in the Terms of Reference for this inquiry in accordance with the still-extant 1993 Cabinet-approved definitions. The assessment by Defence of RCB service by reference to those definitions is discussed in detail in Chapters 16, 17 and 18.

9.10. The Tribunal noted that Defence did not provide all the documents or analysis sought by it. In some cases it appeared that documents that were sought may never have existed – for example, prepared scripts for briefing RCB members prior to deployment and on arrival. In other cases it was clear that documents would have existed but Defence advised that they could not be located – for example, it provided only 10 end-of-tour reports out of the more than 70 that presumably would have been written.

9.11. However, with only two exceptions, the Tribunal was satisfied that Defence made all reasonable endeavours to meet the requests it made.

9.12. Those two exceptions were, however, significant.

9.13. Attachment F to the RCB Review Group submission of 19 September 2022 was a matrix purporting to compare RCB service with service on other operations that had been, either initially or subsequently, classified as warlike. That matrix was also included in the Australian Rifle Company Group Veterans 1970 – 1989 submission of 30 November 2022. It is at Appendix 3 of this report. The Tribunal asked Defence for a detailed response to that matrix. On 16 November 2022 Defence provided a partial and, the Tribunal considered, unsatisfactory response.[206] Accordingly, the Tribunal again requested a detailed response.[207] On 31 January 2023 Defence refused that request and simply advised that:

- *Operations are not compared against each other to determine the nature of service.*
- *Nature of service assessments are not influenced by precedent.*

[206] Submission 96a, Department of Defence
[207] Letter, Mr Jay Kopplemann to Dr Paul Robards, 24 November 2022.

- *Operations are assessed on their own merits.*[208]

9.14. The Tribunal readily accepted that precedent alone was not a valid basis for awarding medals – one must first be satisfied that the precedent is apposite and correct. The Tribunal also readily agreed that each case should be decided on its merits. But the avoidance of anomalous decisions to grant recognition is fundamentally important to maintaining the integrity of the Defence Honours and Awards system. That was clearly recognised by the CIDA Inquiry in its Principle 3 which stated:

> *To maintain the inherent fairness and integrity of the Australian system of honours and awards care must be taken that, in recognising service by some, the comparable service of others is not overlooked or degraded.*

9.15. Moreover, the whole purpose of each of the Mohr Review, the follow-on Defence review and the Clarke Review was to deal with perceived anomalies in previous service recognition decisions.

9.16. The Defence refusal to respond to the claims of anomaly reflected in the matrix left open two possible inferences, namely:

a) analysis would show that Australian Active Service Medals had been correctly awarded to other service that was directly comparable to RCB service; or

b) analysis would show that previous awards of Australian Active Service Medals were incorrect.

9.17. At hearing, Defence simply offered no comment when those possible inferences were put to it. In the Tribunal's view, this was unacceptable.

9.18. The second exception related to the Tribunal's request that Defence provide a risk assessment of RCB service by applying its modern threat and risk assessment methodologies to the historically available information. In response Defence stated on 31 January 2023:

> *Defence commands responsible for conducting Military Threat Assessments (the Defence Intelligence Group, Joint Operations Command and Joint Health Command) conduct the assessments on current Australian Defence Force operational service. Defence is not able to provide the Tribunal with a hypothetical modern day Military Threat Assessment based on service described in historical documents.*[209]

[208] Submission 96b, Department of Defence
[209] Submission 96b, Department of Defence.

9.18. The Tribunal had no statutory power to force Defence to meet these requests. Accordingly, it was left in the position where it had no option but to reach its conclusions on the best available information.

9.19. While it would have been preferable to have all the documents, information and analysis requested of Defence, the Tribunal was nevertheless satisfied that the absence of that material, while making the Tribunal's task more difficult, had not prevented it from reaching rigorous and fully justifiable answers to the questions before it.

Chapter 10 Irrelevant considerations

10.1. As outlined earlier in this report, if RCB service is to be recognised by the medals and veterans' entitlements being sought be RCB veterans, the following legal instruments must be made:

a) declarations by the Governor-General under each of the AASM Regulations and the AASM 1945-1975 Regulations, on the recommendation of the Minister for Defence, that RCB service was 'warlike'; and

b) a determination by the Minister for Defence under the VEA that RCB service was 'warlike'.

10.2. There is no definition of the term 'warlike' in the AASM Regulations or the AASM 1945-1975 Regulations and it is thus a matter for the Minister to decide the circumstances in which they will make the requisite recommendations to the Governor-General.

10.3. There is a definition of 'warlike service' in the VEA but it is not substantive – it leaves it to the Minister to decide the circumstances that they will determine to be 'warlike'.

10.4. Given that each of the AASM Regulations, the AASM 1945-1975 Regulations and the VEA confer these discretions on the Minister, there may conceivably be questions about whether Cabinet could legally direct a Minister as to the exercise of their discretion. However, there is no question that a Minister can seek Cabinet approval for, or advise Cabinet about, the way in which they propose to exercise their discretion.

10.5. The 1993 definitions were proposed by the then Minister and approved by Cabinet. The use of those definitions for the resolution of future anomalies in service classification was advised by the then Minister in 2000 and not disagreed by Cabinet.

10.6. As outlined in Chapter 7, there has been no subsequent informed Ministerial decision, consent or approval to depart from those positions.

10.7. In these circumstances, it is apparent that a number of considerations that have occupied a great deal of the previous debate over the classification of RCB service are simply irrelevant.

Allotment for special service

10.8. As discussed in Chapter 7, allotment for special service is not a nature of service but simply an administrative, bureaucratic mechanism for identifying those ADF members who have rendered special service. The relevant nature of service was 'warlike operations or state of disturbance', for which there was at the time no substantive definition. Moreover, to retrospectively purport to allot RCB veterans for special service under legislation that has since been repealed would not be of any legal effect.

10.9. While allotment is a relevant criterion under the VEA for certain categories of qualifying service, it is not a relevant criterion under that Act for the only category of service under which RCB veterans could receive the entitlements they are seeking to receive – 'warlike service'.

10.10. Allotment is similarly not a relevant criterion under the AASM Regulations or the AASM 1945-1975 Regulations.

10.11. And allotment is not a relevant criterion under the 1993 definition of 'warlike'.

10.12. Allotment for special service is simply not a relevant consideration in the context of the present inquiry.

Incurred danger

10.13. As noted in Chapter 7, the Mohr Review made its recommendations on a particular view of the 'incurred danger' test that had historically been an eligibility criterion for repatriation benefits. In consideration of those recommendations, the Government considered (correctly in the Tribunal's view) that the Review had misconstrued that test and, moreover, that the applicable test was set out in the 1993 Cabinet-approved definitions of 'warlike' and 'non-warlike'.[210]

10.14. Many individual RCB veterans and their representative organisations have relied on the Mohr Review's formulation of the incurred danger test in support of their claim that RCB service was 'warlike'. While that reliance may have been understandable, it was in the Tribunal's view misplaced.

10.15. Under the VEA, 'incurred danger' is an applicable test for some categories of qualifying service. But as explained in Chapter 5, if RCB veterans are to be granted the veterans' entitlements they seek, they must satisfy the different test of 'warlike service'. The 'incurred danger' test is simply not applicable to RCB service and therefore, whatever it means, is not relevant in the present inquiry.

Malaysian request for ADF Assistance

10.16. Over time Defence repeatedly asserted that RCB service could not be 'warlike' because RCB veterans were not allotted for special service and that they were not eligible to be so allotted because Malaysia had not requested that the ADF render assistance to it beyond Confrontation.

10.17. As noted above, allotment is irrelevant to the nature of service. Moreover, the suggestion that a Malaysian request for assistance was a pre-condition for allotment involved a clear misreading of the 1965 Cabinet decision.

[210] Cabinet Submission JH00/88, 17 March 2000, Cabinet Decision JH/00/0088/CAB dated 21 March 2000, Review of Service Entitlement Anomalies in Respect of south-East Asian Service 1955-1975.

10.18. A Malaysian request for ADF assistance was simply not a relevant consideration in the context of the present inquiry.

Primary and other purposes of service

10.19. Nature of Service papers over the years have focussed intently on identifying the purpose of RCB service. They have consistently identified the primary purpose to have been exhibiting an ADF presence on the ground in Malaysia. They have identified other purposes as being training and providing additional security for Butterworth Air Base. On occasions these other purposes have been ranked second and third respectively; on other occasions they have been ranked in the reverse order.

10.20. There is no doubt that the purpose of the RAAF presence in Malaysia was to exhibit an ADF presence on the ground and in the air in Malaysia both in support of Malaysian independence and as a pre-positioned force in the event of any threat to Australia. Accordingly, any ADF unit that rendered that purpose viable can be seen to have had that same purpose. RCB deployments, by being available to assist in the security of the Air Base, thus had that purpose.

10.21. But the Tribunal considered that it was clear that the proximate cause for those RCB deployments was the assessment that neither the Royal Malaysian Air Force nor the RAAF's own security personnel provided an adequate assurance that the base could be defended against an attack by Communist Terrorists if it occurred. The Tribunal was satisfied that RCB deployments would not have occurred but for the need to provide an additional security capacity. On no other occasion has the Army been deployed to provide on-base protection of an RAAF air base.

10.22. Once the RCB was deployed, the Tribunal considered that it would have been inefficient, if not negligent, to simply leave RCB members to sit idle unless and until an attack occurred. It was clearly necessary that they constantly train and rehearse their base security role, and it was additionally sensible that the opportunity be taken for other more general infantry training (stand-alone or jointly with Malaysian forces) to the extent that such could be scheduled consistently with its QRF role. While it had been politically expedient for a time to publicly depict RCB service as only a training exercise, that was never an accurate description. In this regard, the Tribunal noted that COSC minutes of 17 October 1973 recorded that:

> *…CAS said that he was disappointed at what was being achieved, albeit slowly, and wondered if it was worthwhile. He would like to see more realistic training; otherwise he would like to have re-considered the question of RAAF guards taking over responsibility for the security of Butterworth. Only some 30 guards were required. He supported CNS's comment that in moving away from Butterworth for training, the Committee was losing sight of the primary task of the company. CAS commented that this could be so, but regard had to be given to the risk of insufficient employment and*

training, also there were aspects of enabling the Army to deploy a unit overseas and exercises with the Malaysian Army to be considered.[211]

10.23. Accordingly, the Tribunal did not challenge the NOS conclusions about the purpose of RCB deployments. Those conclusions always accepted that Base security was one of those purposes.

10.24. But the fundamental point is that there is nothing in the definitions that suggests that service can only be declared or determined to be 'warlike' or 'non-warlike' if it has a particular primary purpose or that it cannot be so declared or determined if its relevant purpose was only secondary or other than primary.

10.25. Essentially, once base security is recognised as a purpose of RCB service, whether that purpose is primary or not is an irrelevant consideration.

A Second Malaysian Emergency

10.26. There has been ongoing disagreement between Defence and RCB veterans about whether there was a 'second Malaysian emergency' during the period of RCB service from 1970 to 1989.

10.27. A declaration of a state of emergency by Malaysia would have affected the nature of the relationship between the Government of Malaysia and the citizens of Malaysia. It could have occurred regardless of any threat to ADF personnel and assets. It would not have affected that threat.

10.28. The definitions of 'warlike' and 'non-warlike' focus on the threat to ADF personnel and assets. In that context, whether or not there was a second Malaysia emergency is an irrelevant consideration in the context of the present inquiry.

Previous legislation and policy

10.29. Defence policy (adopted without any informed approval or consent by Ministers or Cabinet and implicitly contrary to Cabinet approval and ministerial advice to Cabinet) is that retrospective reclassification of ADF service is conducted by reference to the legislation and policies applicable at the time of that service rather than those applicable at the time of consideration.

10.30. Whether past legislation and policy is a relevant consideration is not immediately clear.

10.31. Clearly, in the present case of RCB service it cannot provide a definitive answer to the salient questions – should RCB veterans be awarded the AASM or the AASM 1945-1975, and should they be afforded the veterans' entitlements they seek. Each of those questions can only be answered under today's legislation and policy framework.

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[211] *Minute of COSC Meeting Held on 17 October 1973*, NAA: A703, 564/8/28 Part 8.

10.32. And why repatriation legislation (as opposed to Defence legislation) should be used to 'reverse engineer' a nature of service classification is far from clear, given that both are not necessarily in lock-step – for example, they were very clearly unsynchronised between 1993 and 1997.

10.33. And if previous repatriation legislation is relevant, why is previous medallic regulation not relevant? Prior to 1988 there was no provision for awarding an Australian Service Medal or Australian Active Service Medal. The Defence approach would seem to suggest that RCB service could not be 'warlike' prior to 1988 because there was no relevant legislation or policy. Such a proposition would of course not be credible, because the Regulations that were made in 1988 clearly provided that service after 14 February 1975 could be 'warlike'.[212]

10.34. To the extent that past legislation and policy is a relevant consideration (which the Tribunal rather doubted), it cannot be the sole consideration because it cannot provide an answer to the questions now being asked.

[212] Similarly, Regulations made in 1995 and 1997 allowed conferral of an Australian Service Medal or Australian Active Service Medal for service between 3 September 1945 and 16 September 1975.

Chapter 11 Relevant considerations

11.1. To be granted the AASM/AASM 1945-1975 and the veterans' entitlements they seek, the service of RCB veterans must be accepted as being 'warlike', rather than 'non-warlike' or 'peacetime'.

11.2. Chapter 7 traced the history of events relevant to previous consideration of RCB service. That history detailed the adoption of definitions of 'warlike' and 'non-warlike' (and, by inference, 'peacetime') by the Cabinet in 1993 for use in determining each of conditions of service, veterans' entitlements and medallic recognition when it approved a submission put forward by the then Minister (which was, in all likelihood drafted by Defence). Chapter 7 also noted that there had been no subsequent Cabinet decision that changed those definitions, nor any properly informed ministerial decision that did so. It recorded that the then-Minister had informed Cabinet in 2000 that the 1993 definitions were to apply to the resolution of future claims of anomalies in service classification. Finally, it noted that while the then Minister approved 'updated' definitions of 'warlike', 'non-warlike' and 'peacetime' in 2018, that approval was on the express basis that they were to apply only to future ADF operations, thereby leaving the 1993 definitions to apply to all previous ADF service, including RCB service.

11.3. Accordingly, the 1993 definitions were the core criteria by which the Tribunal needed to consider the classification of RCB service.

11.4. At the same time, the Australian Active Service Medal and Australian Service Medal Regulations, and the VEA all use the terms 'warlike' and 'non-warlike' without providing express definitions but instead confer on the Minister a broad discretion as to what they recommend to the Governor-General under those Regulations or what they determine under the VEA to be 'warlike' or 'non-warlike'. In these circumstances, section 110W(3) of the Act would allow the Tribunal to recommend the adoption of alternative definitions if it concluded that the 1993 definitions were inappropriate for any reason.

11.5. The 1993 definitions are set out at paragraph 7.17 of Chapter 7. A plain English reading of those definitions makes it clear that:

a) the definitions are expressed in prospective terms, thereby requiring consideration of the facts and circumstances as they stood at the outset of service rather than with the wisdom of hindsight after the completion of service;
b) they apply only to 'military activities';
c) the 'risk associated with the assigned tasks' in 'non-warlike' service is 'short of' that in 'warlike' service;
d) the 'application of force' must be authorised for the relevant military activities;
e) in 'non-warlike' service, the application of force must be 'limited to self-defence';
f) there is no such limitation on the authorised application of force in 'warlike service';
g) in 'warlike' service there must be an 'expectation' of casualties; and

h) in ‘non-warlike’ service ‘casualties may occur but are not expected’.

11.6. It is also clear that, while each definition includes a list of service that meets the relevant definition, those lists are not exhaustive. Other service that meets the ‘headline’ definition can be relevantly ‘warlike’ or ‘non-warlike’.

11.7. As a result, the relevant considerations to which the Tribunal was required to have regard in considering the proper classification of RCB service required identification of:

a) the relevant military activities;
b) the degree of risk involved;
c) the authorisation of force; and
d) the likelihood of casualties.

11.8. While the updated 2018 definitions are not applicable to RCB service, nevertheless the Tribunal considered whether or not they might cast any light on the meaning to be afforded to the 1993 definitions. It did this because the CDF, in his minute to the Minister seeking agreement to the updated definitions, stated that:

> *The 1993 framework … remains practical for classifying ADF operations … the new definitions do not alter the intent or direction provided by the 1993 definitions. They do, however, promote a better understanding that NOS decisions are based on the exposure to the risk of harm to ADF personnel from hostile forces, consistent with the historic basis for the provision of repatriation benefits.*

11.9. Chapters 16, 17 and 18 detail the Tribunal’s assessment of RCB service against the 1993 definitions and note the implications, if any, of the 2018 definitions.

Chapter 12 The New Zealand reassessment

12.1. Before embarking on a detailed examination of the relevant considerations identified in the preceding chapter, it was appropriate that the Tribunal consider the New Zealand Government's reassessment of the Butterworth service of its own defence force personnel to ascertain whether that identified anything of relevance to its assessment of RCB service.

12.2. Under the FESR and ANZUK arrangements, New Zealand Defence Force (NZDF) personnel served at ABB from 1971 to 1973 performing the same duty as RCB veterans.

12.3. Principles approved by the New Zealand Cabinet provide that *medals are awarded to recognise service that is beyond the normal requirements of peacetime service in New Zealand*.

12.4. An independent Medallic Review Joint Working Group concluded in 2013 that ABB service and other New Zealand military service in South East Asia from 1955 to 1989 was peacetime service and thus, in accordance with that principle, it received no medallic recognition.

12.5. In response to prolonged urging from veterans, in March 2021 the NZDF conducted a reassessment of the recommendations of the 2013 Working Group. That reassessment had regard to a great deal of historic documentation that had been accumulated over time by RCB veterans and their representative organisations and that had not been available to or considered by the 2013 Working Group.

12.6. The reassessment used the NZDF Operational Threat Matrix as a guide to determining operational threat levels. Under that matrix, threat (rather than risk) is classified as Very Low, Low, Medium, High or Very High. The lowest classification leading to medallic recognition is Low. The Very Low classification attracts no medallic recognition with the operational threat to NZDF personnel being similar to that associated with peacetime activities in New Zealand.

12.7. Under the Low classification, the operational threat posed to NZDF personnel is marginal but noticeably greater than associated with normal peacetime activities. NZDF casualties are unlikely.

12.8. Medium and Low are considered non-warlike. Classification at High or Very High is for warlike service.

12.9. The reassessment concluded that:

a) *South East Asia in the 1960s and 1970s was generally, but not always, above the threshold of contemporary peacetime service which is one of the key principles of operational service*;[213] and

b) NZDF service at ABB in 1971-1973 *was clearly for operational reasons rather than for the stated training purposes*[214] and *should be seen as completely different to equivalent peacetime New Zealand Armed Forces' service in the same period*.[215]

12.10. It recommended that NZDF service at ABB in 1971-1973 should therefore be recognised by award of the New Zealand Operational Service Medal.

12.11. While the New Zealand reassessment was clearly a motivating factor in the former Minister's decision to direct the conduct of the present inquiry, the Tribunal concluded that its classification of that service as Low on the five-point operational threat matrix provided no support for either the Defence contention that RCB service was 'peacetime' or the RCB veterans' claims that it was 'warlike'.

[213] Report, *Reassessment of the Recommendations of The Medallic Recognition Joint Working Group on New Zealand Military Service in South East Asia 1955 to 1989*, March 2021, p.9. Document no. 001
[214] Ibid, p.5.
[215] Ibid p.42.

Chapter 13 Interpreting the definitions

13.1. Having concluded in Chapter 7 that the 1993 Cabinet-approved definitions remain the extant expression of Government policy on when ADF service over the relevant period should be classified as 'warlike' or 'non-warlike', it was necessary that the Tribunal give consideration as to how those definitions should be interpreted.

13.2. The definitions are not embodied in an Act, Regulation or other legislative instrument. Thus the formal rules for the interpretation of such documents, embodied in the *Acts Interpretation Act 1901* and the *Legislation Act 2003*, are not applicable.

13.3. Rather, the definitions are simply an expression of Government policy as to when declarations and determinations made under or for the purposes of legislation should be made.

13.4. Because of this, the usual starting point for interpretation would be an assumption that words and phrases used in the definitions would bear their ordinary meaning in common English usage.

13.5. However, that starting point assumption can be displaced if it is apparent that words and phrases are used in a technical or 'trade' context where they ordinarily have a meaning that differs from that in ordinary English usage. For example, the word 'bastard' in a hardware tool catalogue will not mean a person born out of wedlock but will be a reference to a rasp.

13.6. It is well known that the ADF uses many words and phrases that do have particular meanings in the Defence context.

13.7. In the present matter Defence suggested that this term 'military objectives' in the phrase *pursue military objectives* that is used in the 'warlike' definition should be interpreted in line with the *Australian Defence Force Glossary* which defines *military objectives* as *legitimate objects of attack* which comprise:

> *a. all combatants who have a capacity and are willing to fight;*
>
> *b. establishments, buildings and locations at which the armed forces or their materials are located;*
>
> *c. other objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.'*[216]

[216] Submission 96b, Department of Defence.

13.8. That definition refers to physical objects rather than aims and, if that meaning were adopted, the word *pursue* would seem to mean chase, rather than strive for or seek to attain. That appeared to the Tribunal to be a rather stilted and inappropriate usage that would reflect an overly narrow interpretation of the term, particularly when compared to longstanding doctrinal view of that term.[217]

13.9. Moreover, the definitions contain other words and phrases that are not exhaustively defined in the Australian Defence Force Glossary and some words and phrases that, while not defined there, are defined or extensively discussed in other authoritative Defence publications.

13.10. This suggested to the Tribunal that the Australian Defence Force Glossary should not be viewed as governing or limiting the meaning of words and phrases used in the definitions, which should instead be given their ordinary English meaning unless there was a clearly identifiable technical or 'trade' meaning in the Defence context.

13.11. Looking at the definitions in that context of service classification, it is apparent that the concepts of risk and hazard are crucial.

13.12. In the 'warlike' definition casualties are expected; in the 'non-warlike' definition they are possible but not expected. Does this mean that in 'peacetime' service casualties are impossible?

13.13. Human existence is never without risk or hazard. Inactivity carries with it risk to health, and even the mildest of activity runs the risk of injury or death. The spectrum of these risks is wide, ranging from the highly improbable to the certain, with innumerable scenarios in between. Risk can never be impossible.

13.14. Risk and hazard in Defence service are no different in the sense that there are innumerable scenarios ranging across the spectrum from highly improbable to certain.

13.15. Clearly, peacetime service is never without risk – for example, lawfully and carefully driving an ADF vehicle on suburban streets always carries the risk of an accident caused by a negligent civilian driver; and strenuous physical training on an Army jungle training exercise at Canungra always carries the risk of bodily injury or even death.

13.16. Accordingly, the Tribunal considered that the risk and hazard to which the definitions refer is that from a hostile opposing force capable of inflicting casualties.

13.17. Further, the Tribunal considered that, consistent with the Defence definition of casualty set out in ADFP 3.14.1 and 3.14.2 *(In relation to personnel, any person who is lost to their organisation by reason of having been declared dead, wounded, diseased, detained, captured or missing),* the casualties to which the definitions refer cover both fatal and non-fatal injuries, both physical and mental.

[217] ADF-P-3, *Campaigns and Operations*, Edition 2 AL2, 2021, p98,

13.18. The phrase *pursue military objectives* is used in the 'warlike' definition but not in the 'non-warlike' definition. This raised a question of whether or not 'non-warlike' service also involves the pursuit of military objectives. In the Tribunal's view, when read in the context of the classification of ADF service, 'non-warlike' service must involve the pursuit of military objectives. In that context, it is necessarily implicit that ADF personnel and resources cannot be deployed for private or non-military purposes.

13.19. This in turn means that the difference between the categories must hinge upon the likelihood of casualties – in 'warlike' they are expected; in 'non-warlike' they are possible but not expected; in 'peacetime' service the casualties that must be contemplated are not inflicted by a hostile opposing force capable of inflicting casualties.

13.20. It is also fundamental in interpreting the definitions to have regard to the words used and to not introduce unwarranted glosses. In particular:

a) the expectation of casualties that triggers the 'warlike' definition is any expectation and does not have to be a 'high', 'medium' or even 'low' or other level of expectation;
b) the possibility of casualties that triggers the 'non-warlike' definition is any possibility and similarly does not have to be a 'high', 'medium' or even 'low' or other level of possibility; and
c) the level of force that is authorised to be applied is not limited to 'lethal' force.

13.21. The fact that the definitions speak in terms of possibility and expectation also has another important implication. It means that the fact that a possibility or expectation did not eventuate is irrelevant. Hindsight may show that a belief that something was impossible was wrong, or that an expectation was unreasonably entertained. But it can never deny that a possibility existed or that an expectation was in fact held. Thus, while Defence noted that ADF service is classified ahead of service for the purposes of determining conditions of service, but after the event for the purposes of medallic recognition, that fact is essentially irrelevant. And indeed, as several historical examples show, medallic recognition is on occasion created and awarded while military operations are continuing and not always after they have been completed.[218] Thus, the fact that a CT attack on ABB never occurred and that there were no resultant *battle* casualties among RCB veterans does not mean that RCB service must be classified as 'peacetime' and cannot be found to have been 'non-warlike' or 'warlike'.

13.22. Finally, the Tribunal considered that, read in context, the term *self defence* used in the 'non-warlike' definitions (which is defined in neither the 1993 definitions nor the 2018 definitions) is not confined to defence solely of the individual applying the authorised force. Rather, the Tribunal took the view that it extends to the protection of all personnel and property which it is the duty of the individual to protect. It is apparent from the 1993 definitions (and

[218] e.g. campaign recognition for Korea, Vietnam, Iraq and Afghanistan.

equally the 2018 definitions) that there are only three categories of ADF service – 'peacetime', 'non-warlike' and 'warlike'. There is not an 'other – not elsewhere included' category. All ADF service must be classified in one or other of these three categories. Unless *self defence* is interpreted to include reactive response to a hostile force attack on other personnel and property, then such service involving only a possibility of casualties but not giving rise to an expectation of casualties would not be classifiable under any of the three categories. Moreover, it would be illogical for ROE to authorise the use of force only for protection of the individual or other personnel, as that would preclude the use of force to repel and defeat an attack focussed on assets that were necessary for the successful defence of a later separate attack on personnel.

Chapter 14 The threat environment

14.1. The Nature of Service reports discussed in Chapter 7 contain much detailed analysis of historic documents discussing the purposes for which RCB deployments were undertaken. They conclude that three purposes were intended:

a) to maintain an ADF presence in Malaysia (both in support of Malaysian independence and as a pre-positioned force in the event of any external regional threat to Australia);

b) to training ADF personnel, both stand-alone and possibly jointly with Malaysian forces; and

c) to provide a quick response force and additional support for the security of Air Base Butterworth.

14.2. The NOS papers note that, on occasions, the historic papers list these three purposes in a different order.

14.3. But, most relevantly, the base security purpose is consistently included.

14.4. As already noted, the Tribunal considered that the immediate and proximate purpose of RCB deployments was to provide additional base security beyond the assessed capacity of the RAAF and the Malaysian forces – that is, the need for additional base security was the *sine que non* and RCB deployments would not have occurred had the capacity of the RAAF and the Malaysian forces been assessed as adequate. Because adequate base security was a necessary condition for the continued RAAF presence in Malaysia and because the primary purpose of the RAAF deployment was to maintain an ADF presence in Malaysia, the RCB thus took on that purpose also. And, given that engagement with hostile forces was only a risk rather than a contemporary ongoing action, it would have been irresponsible to leave RCB members unoccupied when not called on for such active engagement and so training (both for the base security purpose and for other more general infantry duties) was quite properly another purpose.

14.5. But, whatever the ranking of purposes, the key issue is that there was a clear purpose of providing additional base security.

14.6. It was thus necessary that the Tribunal consider the nature of the threat that the additional base security provided by RCB was intended to combat.

The threat environment

14.7. The Tribunal had no doubt that the Government of Malaysia was involved in a warlike campaign against Communist Terrorists throughout the period in question. Nor had the Tribunal any doubt that the RCB was deployed to Malaysia to provide additional security for Australian defence assets, personnel and their dependants at a time of regional uncertainty, as discussed in Chapter 6. The Tribunal was sensitive to this adjacent, and at times proximate,

conflict between other parties, and necessarily sought to draw a distinction between the risks faced by Malaysian Armed Forces, who were quite clearly directly involved in the conflict, and the risks to Australian interests.

The Threat to Butterworth 1970-1974

14.8. A threat assessment generated in mid-1969 (around 18 months prior to the first detachment of an Australian Army company to Butterworth in November 1970) identified, against the context of the withdrawal of British forces from the region, that *the most likely threats to security to British and Australian/New Zealand bases in Malaysia and Singapore (were) spontaneous labour troubles, from which minor threats to British, Australian/New Zealand military personnel and facilities might develop.*

14.9. The report also identified a *consistent danger of communal unrest, especially in Malaysia. A serious outbreak could have an adverse effect on British (and ANZAC) bases*[219] *…The threat of sabotage or para-military attack by guerrilla bands hardly exists, although there could be some danger to installations in north Malaysia if the general security situation in Malaysia were to deteriorate. Arms, ammunition and explosives could become targets for theft by criminal or subversive organisations if security regulations are not rigorously enforced. The large quantity of stores and equipment being shipped out of Malaysia and Singapore during the rundown will offer considerable opportunities for stealing and pilfering.*[220]

14.10. The prediction of *consistent danger of communal unrest*, *especially in Malaysia* likely reflected the racially motivated riots that had been evident in Malaysia since 1964 and which had reignited just months before the report was generated. Interestingly, the report appeared to somewhat downplay the risk of sabotage and/or para-military activity despite the fact that the Communist Party of Malaya (CPM) had just 12 months previously publically announced its intention to return to armed conflict.[221] Regardless, this assessment suggested that despite the CPM's declared intent there was little evidence of momentum within the communist uprising at the time of publication. The absence of a coherent para-military threat at that time was also supported by the reports from ground defence experts who toured Vietnam and Butterworth in late 1969. These reports were notable for their focus on administrative matters and the absence of any security concerns at Butterworth.[222]

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[219] Numerous intelligence reports supported the view that, in the longer term, Malaysia would likely face a future threat from communal unrest. As an example, see RCBRG document 19680703, Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

[220] *'Shared defence of military installations in MY and SG (DAP/FE DRAFT)'* of 20 June 1969, paragraph 6. (Document number 117, p.152).

[221] *Minutes of a Conference held at Air Base Butterworth on 4th November 1971 to discuss the shared defence of Air Base Butterworth,* 4 Nov 1971, Annex A, paragraph 1, Document number 116.

[222] *SOUTH EAST ASIA VISIT,* drafted by Operational Requirements (Ground Defence) (OR(GD)) staff, 10-15 September 69 (Document number 117). Apart from reference to two defence plans being redrafted (paragraph 32) there is no operational content. Also DEFAIR Minute to HQBUT re SEA VISIT 10-15 SEP 69, the response

14.11. Regardless, in late February 1970, the Commander of the Far East Land Forces (FARELF) directed Officer Commanding Butterworth (OC BUT) to formulate plans in the event of an Internal Security situation in Penang and the Butterworth area. The plan was to provide protection for British, Australian, New Zealand and Gurkha personnel and British, Australian and New Zealand based civilians employed by the Forces, their dependents, Service property, installations and equipment[223] The threat was not specifically identified.

14.12. By 1971, communist terrorist capabilities had developed to the extent that the ability of the Malaysian Armed Forces to adequately deal with the security situation at the seat of the issue - along the Malaysia/Thai border - was questionable. Indeed, there was a sense that, notwithstanding *the vigorous prosecution of operations by the Malaysian Army,* the general situation in the border area had generally deteriorated over the previous two years.[224]

14.13. In March 1971, following an attack on a railway bridge near Butterworth and indications of CT camps close to Butterworth, Malaysian military intelligence warned that the threat to all RMAF bases was now *very seriously regarded* and assessed ABB as a *probable target*. This assessment appears to have been made exclusively on the basis of CT numbers and activity levels.[225] However, when reporting this outcome back to Australia, the Australian High Commissioner to Malaysia offered a more tempered view, the relevant parts of which are reproduced below in full for context and clarity:

> *3. It has been in our minds for some time that the proximity of the area of border operations to Air Base Butterworth, now underlined by the discovery of camps near Kulim (which was a bad area during the emergency and into which the Communists are now apparently moving again), could raise questions about the security of the base in general and our Mirages in particular. To mount attacks on air bases, whether by infiltrating parties with explosives, or by mortar attack from the surrounding countryside, has been a popular tactic in Vietnam and more recently at Pochentong in Cambodia. In Malaysia, the CTF and MNLF have of course so far restricted themselves to minor acts such as damaging railway bridges or setting small bombs in towns, usually accompanied by red flags; and these activities have been designed more for the propaganda effect than anything else. At some point, it might seem attractive to mount something similar against Air Base Butterworth (although mortar attacks are considered highly improbable at the present time). The motive for such an attack directed either against the RMAF, or for that matter, against our own aircraft, given that Butterworth is, in Communist eyes, a foreign*

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to SOUTH EAST ASIA VISIT, is notable only for its extremely domestic focus. There are no threat-related topics.

[223] *Directive from CMDR FARELF to OC BUT on C2 in Internal Security of Penang and Butterworth*, Document number 117, p. 145

[224] Ibid, p.89

[225] Ibid, p.90

base, could become stronger as and when RMAF use of Butterworth as a base for border operations is increased.

4. This would, I imagine, be very awkward for us politically, not to speak of the possible damage to aircraft or to the base.

5. Though any opinion must be a matter of guesswork, the immediate risk may not be great, for at least two reasons: first, that to mount any attack against Butterworth would be rather a serious decision for the Communists to take: second, it may provoke increased effort on part of the Malaysian security forces, which the Communists might well not wish to stir up at present. All the same, the report of an attack against a railway bridge only eight miles from the base does suggest that it could be unwise to disregard the possibility of some trouble.[226]

14.14. Notwithstanding the use of vague language (i.e. *the immediate risk* [to Butterworth] *may not be great*) that makes direct comparisons of likelihoods of attack difficult, the High Commissioner's summation casts an element of doubt on the Malaysian assessment. Regardless, the content of the High Commissioner's report prompted a request for an update on security at Butterworth from the Secretary of Defence, Sir Arthur Tange.

14.15. The draft response to Sir Arthur Tange, dated 30 April 1971, is principally based upon a JIO assessment of the threat, which stated:

Whilst there may be propaganda to be gained by action against a Malaysia Base, the equipment and experience of the CTO at present limit their capacity for such action.[227]

14.16. JIO also found that the insurgent groups *were still mainly concerned with preparing for insurgency* and considered it *unlikely that the CTO or MNLF will initiate armed action against Butterworth in the next twelve months unless an opportunity for attack presented itself as a result of the diversion of security force to quell civilian disturbances.*[228] The draft response, originally intended to accompany the JIO assessment, also assessed that the diversion of security forces was *unlikely.*[229] Although the draft document was never despatched to the Secretary of Defence, having eventually been replaced by a pithier alternative, it nevertheless stands as a record of the views of senior Australian personnel at the time.[230]

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[226] Ibid, pp.86-7.
[227] *JIO Assessment of threat to Butterworth*, prepared for DAFI, April 1971, Document number 117, p.50.
[228] Ibid, p.51.
[229] DRAFT Memo from Secretary of Air to Secretary of Defence, Document number 117, p.45. The memo also assessed the threat at Butterworth as *'minor'* (paragraph 3).
[230] The Tange response is also consistent with an internal Air Force report on the security situation at Butterworth. This report sought to address concerns that had been raised in a series of newspaper articles immediately prior to its production that had suggested that the bases defences were *'inadequate in view of the alleged threat.'* The report determined that *'the threat to Butterworth has not increased in recent months' the threat being defined as 'only that resulting from unco-ordinated actions by dissident elements,* although it also

14.17. The Tribunal considered that this JIO assessment was critical to this inquiry since it clearly ran counter to the Malaysian assessment that Butterworth was a *probable target*, and was more closely aligned to the view initially offered by the High Commissioner. The draft response also confirmed that the ANZUK Army element at Butterworth was not integrated into the base defence plan at that stage *since as its presence at all times could not be guaranteed.* Given that that three absences each of one month were planned throughout 1971 and that unplanned absences were also possible, the view by the Secretary of the Department of Air was that the Army company *should only be regarded as being supplementary to the base defence plan*.[231] The Tribunal considered that this posture accurately reflected the extent to which the CTs were considered a threat to Butterworth at the time.

14.18. In November 1971, a conference at ABB, held to discuss the shared defence arrangements at the base, clearly saw the principal threat to the base as being *small-time sabotage*[232] and was informed that there were a limited number of trained saboteurs who were *unlikely to take any offensive action at the moment.*[233] Annex A to the conference minutes also contained an assessment of threat to the base: *It is our assessment that so long as the group of Communist terrorists are confined to the jungle areas of the Mahang Forest Reserve, it is very unlikely that these CTs will be able to carry out acts of sabotage against the air base.*[234]

14.19. But, in the Tribunal's view, the most comprehensive and definitive threat assessment of Butterworth in 1971 was the ANZUK Intelligence Group's *The Threat to Air Base Butterworth up to the end of 1972.* This document was firmly focussed on the threat of communist terrorism, and provided an in-depth analysis of the strength, organisation, location and capabilities of the CTs. It found that the CTs intentions were largely centred on consolidation around recruiting, improved support amongst the local population and improved infrastructure, and that the *initiation of armed struggle throughout West Malaysia by the end of 1972 was unlikely.*[235] The report also provided detailed analysis around the preconditions in which Butterworth might be attacked. Its ultimate findings, though, were that although there was a potential threat to the base from a number of communist organisations relatively close to it:

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conceded that improvements to the collection, exploitation and dissemination of Butterworth-centric intelligence were required. *(Security of Australian personnel and assets: Air Base Butterworth,* Air Force Provost Marshal and Strategic Requirements (Ground Defence), 27 April 1971, Document number 117, p.80.

[231] DRAFT Memo from Secretary of Air to Secretary of Defence, Document number 117, p.48.

[232] *'The Chairman discussed the local threat and highlighted the need to guard mainly against small time sabotage.' Minutes of a Conference held at Air Base Butterworth on 4 November 1971 to discuss the shared defence of Air Base Butterworth,* 4 November 1971, Document number 116, p.129.

[233] *Minutes of a Conference held at Air Base Butterworth on 4th November 1971 to discuss the shared defence of Air Base Butterworth,* 4 November 1971, Document number 116, p.128.

[234] *Minutes of a Conference held at Air Base Butterworth on 4th November 1971 to discuss the shared defence of Air Base Butterworth,* 4 November 1971, Annex A*, Security Briefing on the Arm (sic) threat at RAAF Butterworth 4 November 1971,* paragraph 9, Document number 116, p.135.

[235] '*The Threat to ABB up to the end of 1972'*, ANZUK Intelligence Group, 30 November 1971, paragraph 43, Document number 116, p.93

a. it was considered *unlikely that the CPM/CTO* [would], *as a deliberate act of policy, attempt an attack on Air Base Butterworth;*

b. it was considered *possible, but still unlikely, that the CPM/CTO could take a decision to attack the Base in certain circumstances;*[236] and

c. it was considered that *there is definitively a risk that one or more CTs or members of subversive groups could, regardless of CPM/CTO policy and/or acting on their own initiative, attempt an isolated attack on or within the Base at any time.*[237]

14.20. In early 1972, a United States Central Intelligence Agency (CIA) Intelligence Memorandum stated that *the insurgency was expected to remain developmental for another two years, during which time the insurgents will be carefully avoiding military action, building up food and supply caches, and fully developing a support system within the local population, There is indeed very little, if any, real fighting taking place in West Malaysia and now is obviously the time for the Government to blunt the Communists efforts….*[238] With respect specifically to Butterworth, the same CIA report stated: *Communist strategy has led the party to turn its back on some rather enticing targets and the chance to make headlines. For example, insurgents are known to be active within 20 miles of Butterworth Air Base….*

14.21. While the remainder of this paragraph was redacted, the Tribunal considered that the inference that there had been a deliberate strategy to avoid attacking Butterworth and potentially involving a third party in the conflict was clear.[239] The Tribunal considered it unlikely that this information would have been made available to Australia, given its security classification at the time. The CIA's assessment also cast doubt on the veracity of the Malaysian assessment of *probable*.

14.22. In May 1972, the RAAF Families Protection Plan (issued as HQBUT OPORDER 2/72) was released. Although the threat was described as *racial communal disturbances to families resident in Base Married Quarters, housing estates and hirings in Butterworth and Pinang,* there was no assessment of likelihood.[240] Unlike PLAN DOWNSTAIRS[241] which had been issued during the Emergency and articulated the way in which Australian dependents would be

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[236] These being that the CTO had been successful in expanding its support base, large-scale civil disturbances/major industrial unrest, increased use of the base for counter-terrorism operations or a judgement by the CTO that a major psychological or propaganda advantage might result.
[237] '*The Threat to ABB up to the end of 1972'*, ANZUK Intelligence Group, 30 November 1971, paragraph 71b-e, Document number 116, pp. 106, 108.
[238] '*The Communist Insurgency in Malaysia'*, CIA Intelligence Memorandum, 27 February 1972, paragraph 23-24. Submission 79,Mr Stanley Hannaford obo the Australian Rifle Company Group Veterans 1970-1989 p.96.
[239] '*The Communist Insurgency in Malaysia'*, CIA Intelligence Memorandum, 27 Feb 1972, paragraph 23-24, Submission 79, Mr Stanley Hannaford, p.96.
[240] *RAAF Families Protection Plan,* HQBUT, 08 May 1972, paragraph 1 a) 1). Submission 127, Squadron Leader Bernard Farley CSM (Retd), p.18.
[241] Comments on DRAFT PLAN DOWNSTAIRS from OC BUT and AS Army Force FARELF, 15 June 1966, Document number 117, page 163.

repatriated to Australia (or Singapore) if required, no consideration was given to repatriation as part of this plan. Instead, in the event that action was required for their protection, families were to be relocated to the base, or to safe centres on Penang.[242] There was no documented requirement in the OPORDER to regularly exercise or war-game the plan.

14.23. By June 1972, Australia was seeking cost sharing arrangements with Malaysia for additional security measures at Butterworth, namely improvements to the perimeter fence, the installation of observation towers along the eastern perimeter, and (potentially) warning devices.[243] These improvements, along with the potential for additional RAAF guards and their 'Military Working Dogs',[244] had been identified during staff visits to Butterworth. Although the Department of Defence – Air Office (DEFAIR)[245] did not see merit in the additional guards and dogs,[246] the other improvements were subsequently implemented on a shared cost basis. The Tribunal saw these additional security measures as prudent mitigations against the possibility of an isolated attack on Butterworth, as identified in the ANZUK threat assessment seven months prior.

14.24. On 18 October 1972, a DFAT cable was despatched to the High Commission in Singapore after staff there had raised their concerns in relation to the possibility of an attack on Butterworth and sought advice on the possibility of seeking an update to the 1971 ANZUK Intelligence Group threat paper.[247] The response read, in part, as follows:

> *(A) The trend of observable CT activity during the past 12 months suggests that they are following, perhaps even more rigorously than in earlier months, a policy of avoiding contacts with security forces in West Malaysia. There have been no recent ambushes of security forces and certainly no attacks, or intelligence suggesting the possibility of attacks, on Malaysian Government installations, military or otherwise.*
>
> *(B) Similarly, we have no recent evidence which would lead us to vary the assessment made last year that the CTs would not for various reasons set out in the threat paper think it profitable as a matter of policy to attack Australian (or other external forces or installations) in West Malaysia in order to gain psychological or propaganda advantage*

14.25. The signal also indicated that the author had verbally confirmed with the ANZUK Intelligence Group co-ordinator, who was *closer to the detail of the intelligence available* that,

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[242] *RAAF Families Protection Plan,* HQBUT, 08 May 1972, Annex E, paragraph 3. Submission 127, Squadron Leader Farley (Retd), p.27. '*State Charlie. If a situation arises in which the security of families in their homes can no longer be guaranteed, requiring a prompt and controlled evacuation to guarded safe areas at the RAAF School, RAAF Centre and Air Base Butterworth. '*

[243] Message seeking clarity around cost sharing arrangements with Malaysia, 6 June 1972. Document number 116, p.52

[244] Guard dogs

[245] Broadly the equivalent of today's Air Force Headquarters.

[246] Memo to COMANZUK from Australian High Commissioner in Singapore, 12 May 1972. Document number 116, p.62.

[247] *Butterworth - Security,* DFAT Signal #548, Brady to Lyon, 18 October 1972, Document number 118, p.35.

were the paper to be updated, *it would be likely to come out with an assessment essentially the same as that of last year.* [248] The Tribunal took this to mean that the assessments at paragraph 19 of this chapter (either *'possible but still unlikely'* or *'possible'*) would remain valid until the end of 1973.

14.26. The security situation around Butterworth appeared to have been stable throughout 1973 and 1974, as evidenced by the Monthly Security Reports issued by the Directorate of Air Force Intelligence (DAFI). Between August 1973 and December 1974 these reports variously use the terms *Quiet around Butterworth, The current threat to Butterworth remains unchanged, No apparent change to the assessed threat at ABB, No change,* or combinations thereof.[249]

14.27. By September 1974, a JIO Study into the threat environment at Butterworth, JIO Study 14/74: *The Threat to ABB up to the end of 1975,* had progressed to the point of being able to circulate a draft report.[250] This document was very clearly the forerunner to what was subsequently formally published in October 1975, the results of which are discussed in the next section.

Tribunal observations re the threat environment 1970-1974

a) The nature of the risk to Australian forces in Malaysia changed significantly over the period as the communist insurgency foreshadowed by intelligence agencies in the late 1960s became increasingly capable.

b) Precautionary plans were developed throughout this period for the protection of RAAF assets, defence members and their families.

c) Although the RCB presence in Malaysia was to augment base security, the threat levels at Butterworth until at least late 1971 were such that the RCB was not required to be continuously present at Butterworth.

d) There is evidence that CT organisations did not have the capacity, experience or intent to attack ABB.

e) Notwithstanding the increasingly deadly conflict between MAF and the CTs, intelligence reports from JIO, ANZUK and DAFI mostly assessed that attacks on Butterworth were unlikely, although an isolated attack on the Base was possible.

[248] *Butterworth - Security,* DFAT Signal #415, Lyon to Brady, 18 October 1972, Document number 116, p.34.
[249] *DAFI Security Reports #15* to *#28*, 31 August 1973 to 4 December 1974, Document number 118, pp.303, 288, 247, 236, 233, 228, 226, 224, 217, 214, 212, 208, 206 and 188.
[250] JIO Study 14/74, *'The Threat to ABB up to the end of 1975'*, September 1974, Document number 116, p8.

f) The Malaysian assessment that Butterworth was a 'probable target' was not supported by JIO, ANZUK and DAFI assessments.

g) There were domestic political sensitivities in relation to the Australian presence in Malaysia that likely demanded a judicious response to possible threats.

The threat to Butterworth in 1975

14.28. The DAFI reports for January and February 1975 continued with the assessments of *Quiet around BUT; no change.* On 1 April 1975, the DAFI report became more expansive, summarising the environment as: *Situation in the BUT area continues to be stable and the threat to ABB is assessed to be low*. [251] As far as the Tribunal could determine, this was the first time the threat situation at Butterworth was ever assessed as *low*.

14.29. But over the period 31 March to 1 April 1975, five Malaysian security force bases were rocketed, including an attack at RMAF Sempang (a military airfield outside Kuala Lumpur) and on Minden Barracks on Penang. There were no casualties in any of the attacks, although a Malaysian transport aircraft at Sempang was damaged.[252] In an advisory letter to the Minister for Defence three days later, the Chief of Air Staff (CAS)[253] indicated that the Malaysians had advised that attacks on Butterworth were *possible* and that increased security arrangements, including vehicle searches and aircraft dispersal and increased patrols, had been implemented. Although the CAS noted that the arrival of maritime aircraft for a six-day exercise would further stretch security resources, there was no suggestion from CAS that the exercise be cancelled or postponed as a result of the attacks. There were no recommendations to the Minister in this correspondence.[254]

14.30. In a draft Directive that had been circulated for comment within DEFAIR immediately after the attacks, ground defence experts recommended that, notwithstanding that *political considerations could rule it out…Malaysian agreement be sought…to allow limited use of the Infantry company outside the perimeter to permit effective protection of our assets.*[255] A handwritten note by the author of the recommendation indicated that a decision on the implementation of the draft Directive was in abeyance pending a decision as to whether Butterworth would be subject to significant changes to command and control arrangements being considered within Air Force at the time, and that *in any event the question of security and threat at Butterworth is under review.*[256]

[251] *DAFI Security Reports #29, #30 and #31*, 31 January 1975; 28 February 1975; 01 April 1975, Document number 118, pp. 178, 182-3
[252] *DAFI Security Report #32,* 30 April 1975. Document number 118, p.158.
[253] The equivalent of today's Chief of Air Force (CAF).
[254] Letter to MINDEF, CAS, 3 April 1975, Document number 118, p.175.
[255] 22 April 1975, Document number 118, p.160.
[256] 22 April 1975, Document number 118, p.160.

14.31. Notwithstanding the staff position that the adoption of additional security measures might be prudent, the JIO position in relation to the CTOs capability and intent seems, in the Tribunal's view, to be abundantly clear:

> *Although the CTO has, in the past, possessed the capability of attacking the Butterworth Base, even during the Malaysian Emergency, such an attack has never eventuated. There is no evidence to suggest that they have either the intention or the ability to undertake actions of that type.* [257]

14.32. The April 1975 DAFI report provided additional detail of the attack and although the report suggested that the security situation was likely to remain tense for around a month, it stood by its earlier assessment that the threat to Butterworth was *low*.[258]

14.33. Within Australia, the rocket attacks generated interest from the Department of Defence. In a letter to Admiral Synnot, Director of Joint Staff, (DJS)[259] in late May 1975, the First Assistant Secretary of Strategic and International Policy (FAS SIP) identified political sensitivities similar to those at paragraph 13 of this chapter and, notwithstanding that the Malaysians were conducting a review into the attacks, requested support for a JIO review of the security of Butterworth:

> *Attack on RAAF aircraft would obviously have significance going beyond the actual damage, bringing into question fundamental political aspects of Australian policy. Risk to the aircraft thus means risk for that policy and political difficulty for the Government in the handling of policy, both substantively and presentationally (e.g. in the Parliament)…*
>
> *We need authoritative advice on the situation and prospects so that policy consideration may be fully informed. If you agree with the foregoing, perhaps you could arrange for a further study, possibly in conjunction with JIO.* [260]

14.34. This letter was forwarded to DEFAIR for comment[261] and, as part of this process, ground defence experts discussed the fact that OC Butterworth had suggested that there was *little threat to RAAF assets* on the assumption that the range of the homemade rockets was around 500 metres. The DEFAIR view was that if *CT possess 81/82mm mortars with a range of 3000m, this would represent an entirely different proposition.*[262] Critically, the dispersal of RAAF Mirages at Butterworth had been discontinued at this stage, just two and a half months

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[257] '*Threat to Butterworth'*, JIO, April 1975, prepared for DAFI, paragraph 4, Document number 117, p.35.
[258] *DAFI Security Report #32*, 30 April 1975, Document number 118, p.158.
[259] Broadly the equivalent of CDF today.
[260] Document number 118, pp. 150-1.
[261] Butterworth Security, Letter from DJS to DCAS, Info Director of JIO, 3 June 1975, Document number 118, p.149.
[262] Butterworth Security, Minute SR(GD) to DGOR, 16 July 1975, Document number 118, p.148.

after the rocket attacks. Regardless, DEFAIR supported the review which, by virtue of JIO Study 14/74, already had momentum (see paragraph 14.27 of this chapter).[263]

14.35. The July 1975 DAFI Report provided detailed analysis following the discovery of a length of wire on the runway centreline, along with reports that CTs were training with mortars, *adding to the threat at ABB*. However, the threat level was not redefined or amended from the previous *low* assessment.[264] Although the subsequent report in August suggested that security arrangements at Butterworth were *less than adequate* and assessed that the threat *must be considered to be slowly increasing*, again there was no modification to the threat level.[265] A Security Situation Report (SITREP) from Headquarters Butterworth the day after provided detailed analysis of reports of holes in the perimeter fence. The SITREP concluded that the holes had been there *for some time* and were attributed to theft.[266] In the same month, the draft JIO report, *Threat to Air Base Butterworth (DRAFT),* was circulated for comment.

14.36. On 14 October 1975, a Minute was despatched to Admiral Synnott from DCAS, Air Vice Marshal McNamara.[267] This Minute included a number of attachments, including a CAS Minute to the Minister for Defence, which in turn was supported by an updated JIO assessment of the threat to Butterworth.[268] Although the JIO assessment appears to have been provided to CAS ahead of the publication of the formal JIO report requested by FAS SIP, it referred faithfully to key findings of it. The only relevant element of the Annex that is not included in the JIO report is the following:

> *Defence Advisor Kuala Lumpur suggests that Air Base Butterworth is of little significance to the CTO and that the Base is unlikely to be singled out for attack in preference to others, unless the scale of RMAF operations from the Base increases significantly. This would be a fair assessment. At the same time, however, putting together all available evidence regarding CTO capabilities and activities in recent months the Defence Advisor suggests that an attack from outside the…perimeter fence must be considered a possibility and we would agree with this view.*[269]

14.37. The JIO threat assessment attached to the CAS Minute concluded (in full):

a. *It is unlikely that any threat to Air Base Butterworth will arise from an external military attack on Malaysia.* [Tribunal comment: This finding refers to the possibility of armed conflict between states, and is not central to this inquiry.]

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[263] Butterworth Security, Minute from DCAS to DJS, 7 August 1975, Document number 118, p.147.
[264] *DAFI Security Report #33*, 3 July 1975, Document number 118, p.152.
[265] *DAFI Security Report #34,* 4 August 1975, Document number 118, p.142.
[266] *Security SITREP*, HQBUT, 5August 1975, Document number 118, p.141.
[267] Butterworth Security, Minute from DCAS to DJS, 14 October 1975. Document number 118, p.33.
[268] Security of Butterworth, Minute from CAS to MINDEF, 7 October 1975. Document number 118, p.36.
[269] The JIO Annex, *'JIO Assessment of Threat and Likely Methods of Attack'*, refers to *'tenuous evidence'* that the CTOs have acquired 81/82mm mortars, Annex A to CAS Minute to MINDEF, paragraph 7. Document number 118, p.41.

b. *There is a potential threat to the Base from the CTO and related communist, subversive organisations.*

c. *CTO policy will be directed towards consolidating the infrastructure in Peninsular Malaysia, but this will not be taken to the point at which a decision to launch the second phase of revolutionary warfare. It is therefore unlikely that the CTO will, as a deliberate act of policy, try to attack Air Base Butterworth.*

d. *It is possible that the CTO could decide to attack the Base if the presence of Australian forces became a major political issue in Malaysia or if there were large-scale civil disturbances and industrial unrest. We consider this development unlikely for the present.*

e. *There is a danger that the CTO may decide to attack the Base to achieve a psychological and propaganda victory over the Government in retaliation for a major success by the Security Forces. Such an attack may also be encouraged by RMAF aircraft using the Base against the CTO.*

f. *There is some risk that members of subversive groups could, regardless of CTO policy or acting on their own initiative, attempt an isolated attack on or within the Base at any time.*[270]

14.38. JIO also stated that *there is no evidence to suggest that ABB will be singled out as a target for attack in preference to another military installation in future operations but, equally, there is no reason to suppose that the base will be excluded from attack in preference to others.*[271]

14.39. The DCAS Minute also provided the RAAF perspective of the intelligence assessment: *Arrangements in being for the protection of families, the security of assets and facilities and security of personnel on the base are satisfactory. At this time no defensive works for the protection of personnel is considered necessary, but base planning has taken into account the requirement for blast shelters should the situation deteriorate further. The requirement for blast protection of aircraft against ground burst weapons and small arms fire together with aircraft dispersal is currently under review.* [272]

14.40. The attached CAS Minute to the Minister recommended that discussion with the Malaysian Prime Minister occur in an upcoming meeting in relation to *1) the allocation of at least one Malaysian battalion; 2) arrangements to operate outside the base and 3) approval to seek short-notice reinforcements of the security arrangements with RAAF ADGs.* [273]

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[270] *'JIO Assessment of Threat and Likely Methods of Attack'*, Annex A to CAS Minute to MINDEF, undated, paragraph 1. Document number 118, p.39.
[271] Ibid, p.42
[272] Butterworth Security, Minute from DCAS to DJS, 14 October 1975, paragraph 4. Document number 118, p.34.
[273] CAS Minute to MINDEF, 7 Oct 75, paragraph 6. Document number 118, p.37.

14.41. In October 1975, the final version JIO report was published. [274] Unsurprisingly, in the Tribunal's view, its findings were identical to those provided in support of the CAS Minute to MINDEF. In relation to CTO Intent, the document stated:

> *We assess the CTO's intentions are to consolidate and extend its present position in Peninsular Malaysia by recruiting and building up mass support among the rural population, particularly in areas where there were large numbers of terrorists in the First Emergency; to cultivate the support of Malay peasants and Orang Asli (aborigines); to develop lines of communications and establish base areas; to consolidate supply links between armed units and the support infrastructure, and to progressively extend CTO influence and presence, especially that of armed groups whilst avoiding major contacts with the Security Forces unless the CTO has an advantage at the time. The CTO seems sensitive to adverse publicity, and it can be expected to carry out retaliatory action for any significant government success. We consider that, at present, in spite of the encouraging example of Indochina, the CTO assesses that it would be premature, and possibly counter-productive, to try to move into the second phase of widespread confrontation, and we also consider that such an attempt is unlikely in the foreseeable future.*[275]

14.42. These findings are entirely consistent with the CAS Annex.

14.43. The Report also expands on the scenarios in which attacks on ABB might be considered. These findings were entirely consistent with the ANZUK assessments of 1971 (paragraph 14.19 of this chapter) with an additional scenario that the CTO might decide to attack the base *if the presence of Australian aircraft and troops on Malaysian soil became a major public issue in Malaysian politics*; this was assessed as *unlikely*.

14.44. The 1975 JIO report was the last published authoritative study of the threat to Butterworth, possibly because DCAS had requested that JIO be asked to *maintain a continuous assessment of the threat and keep* [Air Force] *informed.*[276]

14.45. Generated just six months after the rocket attacks, the report did not elevate either the likelihood of attack or the threat levels at Butterworth, and went as far as to say that the CTs were unlikely to reach a position in the foreseeable future where attacks on the base were likely. This was remarkably similar to the sentiments that had been articulated by both the April 1971 JIO report that had formed the basis of the reply to the Secretary, Sir Arthur Tange (see paragraph 14.15) and the February 1972 CIA report (see paragraph 14.20).

14.46. Although the DAFI reports noted that the threat level was slowly increasing (nominally from *low*), the level it reached was never quantified.

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[274] *The Security of Air Base Butterworth,* JIO, October 1975. Submission 79, Mr Stanley Hannaford, obo the Australian Rifle Company Group Veterans 1970-1989. p. 122.
[275] *The Security of Air Base Butterworth,* JIO, October 75, paragraph 28, Submission 79, Mr Stanley Hannaford.
[276] Butterworth Security, Minute from DCAS to DJS, 7 August 1975, Document number 118, p.147.

Tribunal observations regarding the threat environment in 1975

a) The March/April rocket attacks on Malaysian military facilities prompted senior defence officials to request a review of threat levels at Butterworth.

b) Although there were legitimate concerns, particularly within Canberra, about the potential for attacks on the base, neither JIO nor DAFI materially altered their stance in light of the rocket attacks on Malaysian facilities.

c) The 1975 JIO report largely maintained the position that had been set by the ANZUK Intelligence Group G report four years previously.

d) Despite DAFI's suggestion that the threat level was 'slowly increasing', it clearly did not get to the point where air exercises were cancelled, ongoing dispersal of aircraft was required, defensive works for the protection of personnel on base were considered necessary or repatriation of families was necessary.

e) The highest likelihood of attack assigned by an Australian Intelligence agency to Butterworth during 1975 was '*possible'*.

The Threat to Butterworth from 1976

14.47. In the absence of any formal threat assessments from the end of 1975, the Tribunal mostly relied upon periodic reports from various Commanders and other officers at ABB that provided insight into observed threat levels. This includes the monthly reports issued by the Commanding Officer Base Squadron (COBS), End of Tour reports from the Officers Commanding the Rifle Company, and a report from 65 Ground Liaison Section at Butterworth. However, there are also a limited number of strategic-level documents that provided insight into the security situation at the time.

14.48. **COBS Monthly reports.** The Tribunal reviewed the monthly reports issued by COBS between December 1975 and November 1978 inclusive.[277] Twenty eight of the 36 reports from that window were available,[278] which the Tribunal considered to be enough to form a sufficiently accurate view of the operating environment at Butterworth at that time.

14.49. What these reports and testimony from Ground Defence Officers from the April hearings in Brisbane reveal is that, although the Ground Defence Operations Centre (GDOC)

[277] In the period in question, RAAF Base Squadrons provided all of the base level services such as catering, range management and security. The ADG at BUT reported to COBS.
[278] Note that the months of December 1975 and January 1976 are combined into a single report.

was never activated to Security State Red, it was routinely activated to Amber.[279] The reasons for activation generally fell into three categories, these being the declaration of a curfew typically precipitated by the CTO communicating their intent to attack Butterworth; the arrival in Butterworth of valuable air assets; and the anniversary of a CT-related organisation.[280] Across the three year period, the GDOC was activated for a combined total 77 days;[281] of these 39 days were associated with F-111 detachments and Air Defence exercises where the change in security status was acknowledged as a precautionary measure, implemented as a matter of course regardless of whether threats to the base had been received.[282] The Tribunal also noted that the four days of activation in July 1976, listed as simply *Possible ground threat to ABB,* coincided with a visit to Butterworth by the Chief of the General Staff and personnel from the RAAF staff college, raising the possibility that these activations were also precautionary.

14.50. From January 1978, the amount of detail in the reports increased following a change in Commander, and the additional justification provided for change in security status shows that, from January 1978 to November 1978, 12 days of activation were generated by CT anniversaries. Prior to that point, the rationale mostly read *Possible ground threat to ABB* or similar, and it was not possible to determine the reason for activation, although if 1976 and 1977 both had similar levels of anniversary-related activations, a total of around 77 activation days would also have been required. In the absence of evidence to the contrary, the Tribunal considered it likely that the rationale for activations pre-1978 would have broadly aligned with the reasons previously identified, these being the declaration of a curfew, the arrival in Butterworth of valuable air assets, visits and key CT anniversaries.

14.51. Although the available evidence did not directly provide a likelihood of attack, the Tribunal formed the view that, on balance and when considered collectively, the available evidence suggested that the likelihood was (no greater than) *possible,* principally because of

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[279] The three states of Base Security (Green/Amber/Red) were defined in the Butterworth Shared Defence Plan (OPORDER 1/71). It was expected that Butterworth defensive operations would be conducted in three states signified by the declaration of successive security states applicable to a progressively worsening situation. Security State GREEN (Cautionary) signalled the possibility of civil unrest or other trouble which might threaten base security; Security State AMBER (Alert) was to be declared when it was known that a shared defence situation at Butterworth was imminent; Security State RED (Emergency) was to be declared when there was a severe threat to base security. These states were used to articulate the degree on readiness of relevant defence elements including the RCB, Command and Control arrangements, roles and responsibilities, co-ordination instructions and required outcomes. *HQ RAAF BAB Operation Order 1/71 - Shared Defence of Air Base Butterworth*, paragraph 3.b. (Document 19710908, pp3-5.) Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

[280] Note that these drivers are not mutually exclusive, the Tribunal has access to some evidence where, for example, a curfew was declared because of an anniversary.

[281] The reports from March, April and May 1976 indicate that the GDOC was activated for *'Possible ground threat to ABB'* but do not indicate the period of activation. The May 1976 report includes comments that *'A COY 6RARCOYGP carried out normal training from 3 May until 31 May 1976 as per company programme.'* On that basis the Tribunal have assumed that the GDOC was not activated for the entire month, and since the majority of activations for *possible ground threat* were one day, the Tribunal have assigned a similar period to these three months.

[282] Oral testimony from Group Captain Coopes MBE (Retd) confirmed that the GDOC was 'automatically' activated as a precautionary measure during significant deployments of aircraft or exercises, whether there was a *bona fide* threat anticipated or not.

the language in the reports (i.e. *possible threat to ABB*); and the precautionary basis for a significant number of the days where the GDOC was activated.

14.52. The Tribunal noted, however, that the definitions provided against Base Security States suggested that, at Security State Amber, *a shared defence situation of Air Base Butterworth is imminent* whilst Status Green signified *the possibility of civil unrest or other trouble which may threaten the security of the air base.* [283] Since the GDOC was *skeleton manned but not activated*[284] at Security State Green, it seemed to the Tribunal that there was a significant misalignment between the way in which the threats were described in the Commander's monthly reports and the activation status. The Tribunal had some difficulty accepting that the listed Amber activations were so dire that a shared defence situation was *imminent*. The *imminent* descriptor arguably sat more comfortably against Security State Red where there was a *severe threat to the security of the Base.* The Tribunal was struck by the possibility that the Amber definition was unnecessarily melodramatic, noting the consistently large number of Amber *imminent* situation activations and the very few occasions on which a shared defence response was actually required. The Tribunal considered that the Amber activations were principally against the *possibility* of a security response being required, as opposed to the probability inferred by the word *imminent* which the Tribunal took to mean *almost certain*.

14.53. In late 1976, and against a requirement to review the future of the deployment of Mirage aircraft in Malaysia by the end of 1976, a Defence Committee paper offered the following view of the threat at Butterworth:

> *The CPM has attacked Security Force Installations in the past. Although we assess that it would be unlikely for Australian personnel and equipment to be a deliberate target, it may conduct further attacks against military installations. Air Base Butterworth could be such a target. It is the most proximate to established terrorist localities and thus the most accessible to attack. The MAF already use it as a base for counter terrorist operations.*
>
> *The likelihood of a terrorist attack endangering the RAAF deployment in the immediate future is presently assessed to be low. It would probably – but not necessarily – be associated with a significant escalation of CPM activity. This is presently assessed as unlikely. It would probably not occur without warning.* [285]

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[283] *HQ RAAF BAB Operation Order 1/71 - Shared Defence of Air Base Butterworth*, paragraph 3.b (1) and (2). (Document 19710908, p4.), Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

[284] *HQ RAAF BAB Operation Order 1/71 - Shared Defence of Air Base Butterworth*, paragraph 3.c (1). (Document 19710908, p4.) Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

[285] *Review of Butterworth Deployment,* Acting FAS SIP, 22 October 1976, paragraphs 19 and 20. (Document 19761022) Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

14.54. Similarly, a report from No. 65 Ground Liaison Section transmitted in April 1977 to Army Office in Canberra stated:

> ***Threat to Air Base Butterworth.*** *Although most of the intelligence effort has been devoted to the combined Thai/Malaysian border operations Big Star One and Two, weekly visits to all (illegible) have been maintained. No recent sightings have been made and no incidents reported in the vicinity of the Air Base. The overall opinion is that there is no immediate threat to the base.*[286]

OC Rifle Company End of Tour Reports

14.55. Coincidentally, the first of the 10 available End of Tour Reports generated by the Officers Commanding the detachments commenced just a few months after the last available COBS report. These reports cover February to May 1979, and between February 1980 and May 1982. Without exception, these reports are characterised by the lack of any *real incidents*, the lack of operational tasking (with the exception of the provision of an off-base security piquet over the period 29 October to 5 November 1981 following the loss of a Mirage fighter) and, for the most part, an absence of threat-focussed reporting. Rather, there was a strong and consistent focus on training and education, sport, recreation and travel. Although these reports are not taken to be necessarily representative of the entire period, they clearly speak for the periods they cover and in the Tribunal's judgement are broadly representative of the periods either side of the coverage.

14.56. The Tribunal also noted a 'researchers comment' of unknown provenance against a 1979 RCB detachment which states:

> *Researchers Comment: Therefore the rotation of rifle companies plus attachments through RAAF Base Butterworth appears to have been a sound training period with much sport interspersed with holidays in Bankok (sic) and Ssingapore (sic). Penang Island itself being a popular tourist destination. There was nothing approaching operational activities against a live enemy at any stage during C Coy 2/4 RAR sojourn at Butterworth.*[287]

14.57. The Tribunal considered that the essence of these statements, as opposed to the detail of them, is broadly consistent with its assessment of the available reports.

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[286] *65 Ground Liaison Section Activities Report 1/77*, Major K. Anderson, 20 April 1977, page 4. (Document 19770420) Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).
[287] *C Coy 2-4 RAR Tour of Air Base Butterworth 14 Feb - 23 May 79,* Major R Chandler, p4. Submission 96b, Department of Defence, Attachment F.

14.58. In 1983, a Cabinet paper discussing whether fighter squadrons might be deployed to Malaysia following the withdrawal from service of the Mirage did not address the issue of a threat to Butterworth, implying that by this stage no coherent internal threat existed. [288]

14.59. The Tribunal was not able to locate any other documents that provided a contrary view, or which spoke directly to the threat situation at Butterworth from 1983.

Tribunal Observations re the threat environment from 1976

- There were no significant security incidents in the period 1976 to 1989.
- End of Tour Reports and COBS reports from the same period do not provide any evidence that attacks on the Base were probable or higher.
- Available strategic-level documents support this view.
- There is clear evidence that the Base GDOC was activated to AMBER on numerous occasions in the period, but these were largely precautionary.
- Despite the fact that AMBER setting refers to an imminent threat, no attack on the base ever resulted.
- The Tribunal considered that the highest likelihood of attack that could be inferred from the evidence is '*possible*'.

Overall Tribunal conclusions about the threat environment 1970-1989

14.60. In light of the above analysis, the Tribunal concluded that, while there was a real possibility of a CT attack on ABB that would pose a threat to Australian personnel and assets, the informed contemporary assessment of that threat throughout the period 1970 to 1989 did not ever rise above the level of *unlikely* or *possible*.

[288] Cabinet Submission No 172, Cabinet Decision 637 dated 30 May 1983, *The Future of RAAF Deployment* Document number 22.

Chapter 15 Authorised application of force

15.1. Having examined in the preceding chapter the threat that RCB deployments were intended to combat, it was necessary for the Tribunal to consider that application of force was authorised for that purpose.

15.2. These authorisations are set out in various historical documents and are variously described as *rules of engagement* and/or *orders for opening fire*. This chapter refers to these collectively as Rules of Engagement or ROE.

The relevant context

15.3. In considering the RCB ROE it is important to bear in mind the context in which the RCB was deployed. As discussed in Chapter 6, the RAAF was present in Malaysia to provide an Australian presence as a deterrent to any external threat to the independence of Malaysia and as a pre-positioned force in the event of any regional threat to Australia. In turn, RCB deployments were in response to the assessment that the security capability of neither the RAAF itself nor the Malaysian Armed Forces at Butterworth would be adequate if there were a CT attack on ABB.

15.4. In these circumstances, there were unsurprisingly a number of significant limitations imposed on RCB operations. These were embodied in a number of different documents throughout the RCB mission but, despite some variation in the way in which they were presented over time, the limitations themselves remained remarkably consistent. A selection of limitations from various documents is presented at Appendix 5.

15.5. The most significant and consistent 'themes' in the RCB limitations included that:

a. the RCB was not to aid a civil power in the maintenance of law and order in civil disturbances; and

b. unless specifically authorised, RCB operations were to be limited to within the lateral confines of Air Base Butterworth.

15.6. To the best of the Tribunal's knowledge, the on-base limitation was mirrored in almost every version of issued ROE, using language similar, or identical, to the following:

> *'You are to take careful note of the fact that your right to shoot ceases at the Air Base boundary fence. You are not to shoot at a person on the other side of the fence.'* [289]

[289] This particular version is drawn from RAAF OPORDER 1/71 Annex C, Appendix 3, paragraph 8, noting that OPORDER 1/71 ROE formed the basis for the majority of issued ROEs across the RCB mission.

15.7. The on-base limitation was amended in later versions to include *'associated off-base RAAF-controlled installations'*, presumably to specifically cover - at least in part - the possibility of RCB involvement in the Families Protection Plan. However, the Tribunal did not locate any modified ROE ever being issued to support such operations.

15.8. Similarly, despite the RCB having been very occassionally used in off-base security roles including guarding aircraft crash sites, there is no evidence that modified ROE were ever issued to support such operations.

15.9. It was not clear to the Tribunal, particularly in the case of the crash site picquet, and given the absence of ROE that specifically permitted the use of force beyond the airfield boundary, how the RCB could have legally employed force in such circumstances should it have been required.

Rules of Engagement

15.10. Although an examination of ROE is critical in any case where the application of force is authorised, the Tribunal was careful to keep this examination in context. As important as they are, ROE must be considered in light of the threat environment, strategic intent, operational imperatives and the task at hand.

15.11. The Tribunal noted that Professor Dale Stephens, an expert on ROE, had stated that *there can only ever be a general relationship between the issued ROE and the actual threat level faced by deployed ADF members.*[290] The Tribunal interpreted this to mean that there is actually, or should be, a relationship. The Tribunal considered it reasonable to assume that, in maintaining some sort of relationship with the threat environment, ROE should broadly reflect a similar trajectory as the threat environment, notwithstanding that the nexus between the two can occasionally be loose, and that changes in ROE sometimes lag behind changes to what can be an evolving or changing threat environment.

15.12. Rules of Engagement are directives designed to regulate the application of military force consistent with Government policies and legal obligations.[291] In addition to giving a voice to Government intent, ROE also reflect Command intent. Consequently, *key to the proper interpretation of ROE is an understanding of command intent and how that is expressed through the rules.*[292] ROE must be consistent with the law but may limit otherwise available legal options because of policy or operational considerations.[293] By virtue of their status as a directive, rather than guidance, commanders are required to seek clarification if the authorised

[290] Stephens, D., *Rules of Engagement and Threat Levels re Butterworth Rifle Company Butterworth*, University of Adelaide, 14 June 2022, p 1(Submission 65, Rifle Company Butterworth Review Group)
[291] ADF Doctrine series**,** *Rules of Engagement,* Edition 3, AL1, 27 September 2021, paragraph 1.2.
[292] ADF Doctrine series**,** *Rules of Engagement,* Edition 3, AL1, 27 September 2021, paragraph 1.9.
[293] Letter from Prof D. Stephens to Chairman RCBRG, *Rules of Engagement and Threat Levels re Butterworth Rifle Company Butterworth*, 14 June 2022, paragraph 1. (Submission 65, Rifle Company Butterworth Review Group)

ROE are unclear, inappropriate or inadequate.[294] The Tribunal considered that this obligation is timeless and enduring.

15.13. There are no direct references to ROE in the 1993 definition of 'warlike' service but there are indirect references. The 'warlike' definition refers to *authorised application of force* and, where the 'non-warlike' definition applies, *the application of force is limited to self-defence* (which, by extension, means that the status of the ROE is central to the definition).

The evolution of RCB Rules of Engagement

15.14. In determining whether the ROE support the claim that RCB service was 'warlike', the Tribunal considered that some analysis of the operating concept, including the environment in which the ROE were intended to be used, and the ROE themselves, was necessary. This included a chronological review of their development and application.

Shared Defence Operating Concept

15.15. In August 1970, the Joint Planning Committee (JPC) considering the defence of shared military installations in Malaysia and Singapore determined, perhaps not unsurprisingly given the history of the British in the region and in the light of their imminent withdrawal, that *Joint security plans would be based on existing British plans.*[295] More particularly, the JPC determined that the draft Singaporean Armed Forces/Royal Air Force (SAF/RAF) plan for the defence of Selatar air base in Singapore was to provide the basis for these plans.[296] The JPC believed that the scope of the Selatar plan was sufficiently broad *to cover those more specific types of action against which Australian commanding officers have the responsibility for protection and security as detailed in the policy endorsed by Chiefs of Staff Committee Minute No. 12/1969. In confining the area of responsibility to that within the perimeter of RAF Selatar, the SAF/RAF plan also satisfies the point made by the Chiefs of Staff Committee that responsibility for action outside the perimeter....remained the responsibility of the appropriate government.*[297]

15.16. Under the agreed shared defence arrangement, the Malaysian military was responsible for general area security beyond the perimeter of the base, and was specifically tasked with: defence against *deliberate attacks by enemy land forces; defence against attacks by parties of enemy guerrillas (sic), either regular or irregular, including raids by sea or airborne attacks;*

[294] ADF Doctrine series**,** *Rules of Engagement,* Edition 3, AL1, 27 September 2021, paragraph 1.8.
[295] Minutes of Joint Planning Committee (Defence of shared military installations in MY/SG), 4 August 1970, Document number 117, paragraph 2a.
[296] Ibid, paragraph 7. In making this determination, though, the JPC were careful to require that draft Selatar plan should act as the model, but not the blue print, for similar shared defence plans of ANZ military installations in both Malaysia and Singapore.
[297] Ibid, paragraph 8.

defence against rocket, artillery, and mortar fire; and defence against attacks inspired by civil insurrection.[298] These were clearly significant military tasks.

15.17. In contrast, Commanding Officers of ANZ establishments (including Butterworth) were responsible for the protection and security of their establishments and installations, equipment, and personnel within the perimeter boundary against *individuals or small parties and enemy regulars, partisans, guerrillas or civil dissidents who have entered or who pose an immediate threat of entering the base, installation or property; sabotage; pilfering; subversion; and espionage.*[299] Although the on-base responsibilities enshrined in the Selatar-based plans, which sought only to counter *intruders and other local sources of trouble intent on causing damage by theft or other means, to installations, equipment, or personnel,* were a significant reduction to those envisaged by the JPC, this narrowed focus appears to be broadly consistent with the way in which the threat was laid out in the June 1969 threat assessment discussed in the preceding chapter which had concluded that, in the absence of saboteurs or a para-military threat, the principal security issue confronting air bases at that time was *stealing and pilfering*.[300] The ROE in force at the time (promulgated as part of OPORD 11/68) thus appeared to be entirely consistent with this pseudo-constabulary role.

15.18. However, as the foreshadowed risks of communal unrest and para-military activity began to materialise, the documented roles of base security forces started to change in response. By the time OPORD 1/70 (*Shared Defence of Butterworth*) was released, on-base security responsibilities included specific reference to *sabotage or malicious damage; civil unrest arising from racial troubles or industrial disputes; the withdrawal of civil labour; and interruption to essential services such as light, water, supplies and waste disposal.* [301]

ROE in force in 1970

15.19. The ROE in force at the commencement of the first Australian Army detachment in November 1970 arguably reflected the lesser threat. These ROE were enshrined in RAAF Operation Order (OPORD) 11/68, issued in October 1968. OPORD 11/68 was principally

[298] Ibid, Annex, paragraph 3
[299] Ibid.
[300] A threat assessment generated in mid-1969 identified, against the context of the withdrawal of British forces from the region, that *'the most likely threats to security to British and Australian/New Zealand bases in Malaysia and Singapore (were) spontaneous labour troubles, from which minor threats to British, Australian/New Zealand military personnel and facilities might develop.'* The report also identified a *'consistent danger of communal unrest, especially in Malaysia. A serious outbreak could have an adverse effect on British (and ANZAC) bases…..The threat of sabotage or para-military attack by guerrilla bands hardly exists, although there could be some danger to installations in north Malaysia if the general security situation in Malaysia were to deteriorate. Arms, ammunition and explosives could become targets for theft by criminal or subversive organisations if security regulations are not rigorously enforced. The large quantity of stores and equipment being shipped out of Malaysia and Singapore during the rundown will offer considerable opportunities for stealing and pilfering.'*
[301] Minutes of Joint Planning Committee, 4 August 1970, Annex, paragraph 7 Document number 117.

written around the procedures required to effect the arrest of intruders, including the way in which firearms were to be used to effect a re-arrest:

> *Any person you arrest within the protected place is to be warned that if he attempts to escape he may be shot, but before shooting you must remember…to use as little force as may be necessary to effect his re-arrest.*[302]

15.20. Although OPORD 11/68 ROE did not contain specific reference to being authorised to employ lethal force in self-defence or for the defence of others this could, in the Tribunal's view, be reasonably assumed although the actual text is limited to the following:

> *If you yourself, or any other person authorised to be in the protected place are being attacked from inside or outside the protected place in such a way as to give you no time to challenge, and you have reason to fear that death or grave bodily injury will result, you may fire without challenging.*[303]

15.21. The Tribunal observed that, in a situation where death or injury was a possible and imminent outcome, the only concession the ROE provided was the removal of the requirement for a verbal challenge. Further, had the use of lethal force been envisaged in this scenario, this section is considered by the Tribunal as being the most appropriate place for its authorisation.

15.22. However, in lieu of the authorisation of lethal force, OPORD 11/68 ROE contained direction to *shoot to wound and not to kill* principally for use during arrest/re-arrest, but also presumably intended for the protection of property and/or where the need for self-defence was not triggered.[304] However impractical, the Tribunal considered that the direction to *shoot to wound and not to kill* was consistent with the general thrust of OPORD 11/68 and supported the view that the perception of the operating environment at the time was sufficiently benign to allow ROE to principally focus on arrest procedures.

RCB ROE 'themes'

15.23. Although, as will become evident over the following paragraphs, a number of different versions of ROE were promulgated between 1970 and 1989, every version was written around sentry and/or patrol roles. All versions of ROE also contained contemporary features, such as the requirement for verbal challenges (time permitting), escalation of force, and the use of minimum force. All ROE variants were specifically limited to within the airbase perimeter, and authorised the use of force for both the protection of personnel and Australian defence assets.

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[302] RAAF OPORD 11/68, Annex F, paragraph 10a. (Document 19681009, p36.), Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).
[303] RAAF OPORD 11/68, Annex F, paragraph 11c. (19681009, p37.) Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).Document
[304] RCBRG document 19681009, p.37, paragraph 12. Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

Sentry/patrol roles

15.24. It was not entirely clear to the Tribunal whether the ROE being specifically tied to sentry and/or patrol roles was seen as an issue at the time, since the current veterans' position is that the RCB in general, and the QRF in particular, were neither patrols nor sentries.[305] Since it was unable to locate any documentation confirming that there were concerns in relation to the adequacy of the ROE at the time, the Tribunal took the view that the RCB/QRF were clearly considered patrols and/or sentries by those who had authorised the ROE. This view is supported by the fact that, as far as the Tribunal could ascertain, no QRF-specific ROE were ever promulgated.

15.25. The Tribunal also noted the alternative position that, in the event that the RCB were neither patrols nor sentries, and where no other specific ROE was generated to support their mission, the RCB would in fact have been operating without any ROE. In this case, they would not have been authorised by ROE to employ force in any way, shape or form and, without that authority, the RCB detachments could not meet the 1993 definitions of 'warlike' or 'non-warlike' service. This would clearly be a nonsense and the Tribunal therefore considered that, despite their preference to not be so labelled, the RCB can be considered to be sentries and/or patrols.

RCB-specific ROE

15.26. The first specific ROE issued for the Rifle Company was an *Interim Directive to Officer Commanding a Rifle Company detached to Air Base Butterworth.*[306] Unlike the OPORD 11/68 ROE, the Interim Directive allowed for *(in extremis)* the use of lethal force during arrest; specifically authorised lethal force in self-defence and in the defence of others; and removed reference to the direction to *shoot to wound and not to kill*. Since the structure of the document is almost identical to the structure of OPORD 11/68, it can be reasonably assumed that the implementation of those changes was a deliberate attempt to promulgate more threat-appropriate ROE from the existing ROE baseline.

Shared Defence of Air Base Butterworth - OPORD 1/71

15.27. On 8 September 1971, the plan for the *Shared Defence of Air Base Butterworth* (RAAF OPORD 1/71) was released. The threat against which the planned defence of Butterworth was based had changed to reflect *a resurgence of militant communist activity both overt and covert; sabotage or malicious damage; racial communal disturbances and industrial*

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[305] '*It should also be noted that the* [OPORD 1/71] *ROE were couched in terms of sentries and patrols. The QRF was neither of these but a reaction force designed to contain and eliminate any enemy penetration of the base.'* Submission 65, Rifle Company Butterworth Review Group, paragraph 103. Also Submission 65b, response to Question 8.22, p15 and Submission 65, Rifle Company Butterworth Review Group, paragraphs 99-103.

[306] Letter, Acting SECDEF to Secretary of Army, 4 January 1971. (Document 19710104, #4) Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

disputes.[307] Importantly OPORD 1/71 overrode the changes implemented by the Interim Directive, reinstating the direction to *shoot to wound and not to kill* and removing specific reference to the use of lethal force in self-defence. The Tribunal saw this this latter aspect as intriguing because it understood it to be the ADF's long-standing legal position and because it had been made patently clear in the Interim Directive. It was not clear to the Tribunal why these features were removed.

The 1971 ANZUK Force Directive

15.28. The ANZUK Force Directive to the OC Butterworth Company was issued on 19 October 1971, just six weeks after OPORD 1/71 had been promulgated. Confusingly, the ANZUK Directive mirrored the Interim Directive, specifically authorising (again) lethal force in self-defence and in the defence of others, and removing reference to *shoot to wound and not to kill*. It was not clear to the Tribunal how these two contradictory ROEs issued by separate command entities interrelated, but the issue is largely academic because in late 1972 the *Orders for Company Commander Defence of Air Base Butterworth* were issued by ANZUK Headquarters. These orders specifically indicated that OPORD 1/71 ROE were to be applied.[308] The direction to *shoot to wound and not to kill* was thus reinstated.

15.29. There was no material change to the ROE for the remainder of the RCB tenure. Although various directives were released over time, all of these variants consistently implemented the features of OPORD 1/71. This means that the 1971 *Shared Defence of Air Base Butterworth* ROE were the basis for the regulation of military force ROE across the vast majority of the RCB tenure, even in periods where the threat had extended to beyond that espoused by the 1971 plan.

15.30. The 1978 version of ROE, extracted from the December 1978 Unit Standing Orders, and which is representative of the ROE in force for the majority of the RCB mission, is at Appendix 4.

Shooting to wound but not to kill

15.31. As indicated previously, OPORD 1/71-based ROE were somewhat irregular by virtue of the direction to *shoot to wound and not to kill* presumably intended for use during the protection of property or during arrest, and/or where the need for self-defence was not triggered. Read in the context of the document, the ROE appeared to allow weapons to be fired at or towards someone, but it is difficult to escape the view that non-lethal outcomes were strongly preferred.

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[307] *Shared Defence of Air Base Butterworth*, Operation Order 1/71, 8 September 1971, paragraph 1. (Document 19710908) Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).
[308] Orders for Company Command Defence of Air Base Butterworth, HQ ANZUK Brigade, dated 4 September 1972. Document number 76, paragraph 5g.

15.32. Defence was not able to provide the Tribunal with meaningful clarity with respect to the direction to *shoot to wound but not to kill*. In its relevant submission, and in response to the question as to whether RCB ROE provided for the use of lethal force in the defence of others, Defence pointed to the range of measures to ensure the minimum use of force, before finally concluding that that *Lethal force, **to wound only**, was to be used as a last resort* (emphasis added).[309] This comment is bordering on the absurd and is particularly unhelpful.

15.33. The Tribunal was also troubled by the number of veterans who were either unaware of the direction to *shoot to wound and not to kill* or appeared prepared to ignore it, presumably on the basis that it was either non-standard or impractical given the nature of the weapons with which the RCB were issued. The Tribunal noted that RCB commanders were under an obligation to report any inability to comply with ROE (per OPORD 1/71 Annex C Appendix 6, paragraph 9) but appear not to have done so at any stage in the relevant period. The Tribunal considered that this either implied that they were unaware of the detail of the ROE, the command intent or their obligations, or that the ROE were seen as being broadly adequate for the task.

15.34. The Tribunal accepted that *shooting to wound* is non-standard, runs counter to ADF training and would be difficult - if not impossible - to execute, particularly at night.[310] The Tribunal acknowledged the issues its inclusion generated but found it difficult to escape the conclusion that, by virtue of its endorsement at the highest levels and its reinstatement (twice) over other versions of ROE, the direction to *shoot to wound and not to kill* almost certainly reflected an intent by both the Australian and Malaysian governments to limit lethal outcomes to the greatest extent possible.

15.35. The Tribunal also had some difficulty understanding how the M60 General Purpose Machine Gun (GPMG), which was routinely deployed as part of the QRF, could have been confidently employed in accordance with the ROE, particularly with respect to the requirement to *shoot to wound and not to kill*.

15.36. The RCB Review Group view on this matter was that:

> *One does not use a machine gun to 'wound'. The mere inclusion of the MGs as authorised weapons in even the smallest QRF (Section strength) let alone an entire company which has 11-12 real machine guns indicates their use was permitted.*[311]

15.37. Notwithstanding this view, none of the OPORDs to which the Tribunal had access authorised the use of machine guns. The two principle OPORDs upon which the majority of ROEs were based (these being RAAF OPORDs 11/68 and 1/71) specifically authorised only rifles, sub machine guns and pistols. One version of ROE (Orders for Company Commander—

[309] Submission 96c, Department of Defence, p7, response to question 8(t).
[310] And/or with a General Purpose Machine Gun.
[311] Submission 65b, RCB Review Group. p 15.

Defence of Air Base Butterworth (issued by HQ ANZUK, and itself based on OPORD 1/71)) went so far as to prohibit the use of machine guns. The Tribunal concluded that this stance likely originated as a direct consequence of less than lethal outcomes at Butterworth being strongly preferred. In any case, the Tribunal did not accept the RCB Review Group's contention that machine guns were authorised at an appropriate level or that their use was permitted. It was not clear to the Tribunal how, in light of the evolution of the ROE and the apparent sensitivities implicit within them, the use of the M60 GPMG became so enshrined in RCB tactical procedures.

15.38. The genesis of the *shoot to wound and not to kill* requirement is unclear but it may have been a remnant of British ROE which had been employed in the SAF/RAF shared defence plans[312] or alternatively a by-product of the sensitivities in Malaysia at the time with respect to the presence of foreign forces so soon after independence, or both. Similarly, the Tribunal found it difficult to escape the sense that the ROE set out in OPORD 11/68 were initially designed to support what were principally constabulary roles in relatively benign environments, and that either the threat environment was sufficiently stable to warrant retention of the original ROE features in subsequent iterations, including OPORD 1/71, or that the ROE simply did not keep pace with the evolving operating environment. The Tribunal noted that, with respect to this second element, that there is no evidence of requests for changes to the ROE over almost two decades.[313]

15.39. There was, however, some evidence that - retrospectively at least - there were concerns espoused by some submitters about the adequacy of the ROE: *The ROE were clearly inadequate for a scenario where a fully armed Infantry Company was deployed in combat, and yet that scenario was possible and anticipated as is shown by the structure, weapons and ammunition holdings of the RCB.*[314] Notwithstanding this understandable view, the issue for those responsible for the promulgation of ROE at the time was whether the issued ROE were sufficiently robust to support a fully armed Infantry Company in combat or whether the potential for a fully armed Infantry Company to be deployed in combat was sufficiently likely to warrant updated ROE. This second aspect is addressed in the preceding chapter. In any event, the Tribunal considered the absence of requests from those immersed in the environment for revised, and presumably more tactically-appropriate, ROE to be telling.

15.40. The Tribunal was also drawn to a comment, albeit of unknown provenance, on a copy of the 1978 ROE in relation to the *shoot to wound* direction which read: *Because some intruders might be "innocent" (minor theft) or kids food scrounging.*[315] The Tribunal took this to be simply confirmation that in 1978, just three years after the 1975 rocket attacks on neighbouring

[312] Minutes of Joint Planning Committee, 4 August 1970, Annex, paragraph 6e. Document number 117

[313] *'There is no evidence 'ROE REQUESTS' (variation requests) were ever made.'* Submission 65b RCB Review Group, p14.

[314] Submission number withheld, Private.

[315] HQFF COMD 722-K11-11, July 1978 Document 19780701. Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

MAF military facilities, the author of the comments considered the *shoot to wound and not to kill* direction to be justifiable.

15.41. The Tribunal had no doubt that the application of lethal force was *in extremis* available in individual self-defence, and in the defence of others.[316] But where the self-defence provisions were not triggered, the use of lethal force was less clear. Although the RCB Review Group's view and the view of the majority of veterans whose submissions addressed this issue was that the ROE issued to them universally authorised the application of lethal force, the Tribunal did not accept that proposition.

15.42. It is important to acknowledge, momentarily setting aside whether *lethal* force was ever authorised, that all ROE variants authorised the use of force for both the protection of personnel and Australian defence assets. As explained in Chapter 13, the Tribunal considered that, read in the context of the 'non-warlike' definition, the term *self defence* extended to include the application of force required in all aspects of defensive operations, including the protection of the assets which base security elements were expected to defend. Noting the geographic limitations that confined RCB operations to the area within the airbase perimeter, and the entirely defensive posture that this generated, the Tribunal concluded that the RCB ROE were *limited to self-defence.*

15.43. This view apparently aligned with the opinion offered by Professor Stephens who stated *Notwithstanding this threat level, it was open for the Australian Government to have restricted the authority for deployed RCB personnel to the limits of self-defence 'only' for the purposes of ensuring base security. Such a position may merely reflect a decision of the Australian Government to assume more risk for its deployed members. There are several compelling reasons why this may have been the case, not least being respect and sensitivity to Malaysian Government concerns and priorities.*[317] This statement appeared to confirm that *self-defence* only ROE were in force during the RCB tenure.

Comparisons with other ROE

15.44. There were also some claims that the ROE used by the RCB were *close to identical* to those used in Vietnam[318] and East Timor.[319] One submission also stated that the RCB's ROE were *not dissimilar to those used on operations in South Vietnam.*[320] The Tribunal interpreted this as a contention that the RCB ROE lent support to a conclusion that RCB service was warlike. The Tribunal did not analyse the ROE used in either Vietnam or East Timor, nor did

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[316] That being *when there was reason to fear death or grave bodily injury for themselves or any other person.* Document 19710104, paragraph 6. Lieutenant Colonel Russell Linwood ASM (Retd).
[317] Letter from Prof D. Stephens to Chairman RCBRG, *Rules of Engagement and Threat Levels re Butterworth Rifle Company Butterworth*, 14 June 2022, page 2. (Submission 65, RCB Review Group p.64)
[318] *'The ROE were close to identical for RCB as in Vietnam (e.g., Nui Dat Base and Vung Tau Base) which were static defended localities.'* RCBRG Response to question 8.13.1. '*How did such ROE differ from those issued to Army personnel in Vietnam or other conflicts?'*, Submission 65b, RCB Review Group, 19 September 2022, p13.
[319] Oral Submission, Wing Commander Gary Penney (Retd), 3 April 2023.
[320] Submission 65b, RCB Review Group, 19 September 2022, p13.

it see a direct comparison of ROEs as being essential to the outcome of this inquiry. In any event, the Tribunal considered it extremely likely that, for the most part, ROE established for Vietnam and East Timor reflected all or most of the themes identified earlier in this chapter, since these are consistent with Australia's approach to warfighting. However, the Tribunal considered it extremely unlikely, given the discord it generated at public hearings, that either of those ROE directed ADF personnel to *shoot to wound, not to kill.* The Tribunal also noted that, notwithstanding the claims that the ROEs were *close to identical* to Vietnam, the RCB Review Group conceded elsewhere that *Nor is it surprising that the ROE authorised under that Act* [Malaysia's Protected Areas and Protected Places Act 1959] *were nothing like the free-fire zones of Vietnam.*[321]

Defensive ROE

15.45. The Tribunal noted that the term *'defensive ROE'* was used on multiple occasions in submissions by Defence.[322] The Tribunal was not entirely sure what this meant. However, it appeared to be in relation to assertions that:

a) the RCB ROE did not *permit the use of force outside the base perimeter*;

b) *the Rifle Company Butterworth security task was limited to the gazetted area of the Air Base Butterworth.*[323]

c) *The rules of engagement for Rifle Company Butterworth do not authorise the use of 'offensive force' (as opposed to self-defensive force) against an identified enemy or hostile force e.g. Rifle Company Butterworth cannot open fire on an insurgent or something they think is an insurgent without being threatened while on base.* [324]

15.46. The Tribunal understood these statements by Defence as a contention that defensive operations cannot constitute 'warlike' service. However, the Tribunal did not accept that contention. As discussed later in Chapter 18, the Tribunal was of the view that military activities conducted in accordance with ROE limited to self-defence can meet the 'warlike' definition where those activities give rise to an expectation of casualties.

Other ROE descriptors

15.47. Although the term *defensive ROE* is not a doctrinal descriptor, there are useful doctrinal descriptors available. These include Government-provided policy guidance in the form of a national policy statement and national policy indicators. The national policy statement is a plain language explanation of Government objectives and provides context for the mission and the ROE. The national policy indicators provide additional guidance to

[321] Ibid, paragraph 106.
[322] Submission 96b, Department of Defence, paragraphs 2.20-2.39.
[323] Submission 96b Department of Defence, paragraph 2.37d.
[324] Submission 96c, Department of Defence, p5.

commanders on how the ROE are to be applied and refer to ROE as being de-escalatory, escalatory or maintaining the *status quo*.[325]

15.48. At the Brisbane hearing on 3 April 2023, Professor Stephens offered the view that the RCB ROE could be considered to be either de-escalatory or designed to maintain the *status quo.* The Tribunal concurred with this view. Although national policy indicators are not definitive in the sense that any given indicator is not 'hard-wired' to an outcome, they do provide a useful guide that can reasonably be used in conjunction with other evidence which supports the extent to which activities meet the 1993 definitions. In this regard, the fact that the RCB ROE were identified as being either de-escalatory or designed to maintain the *status quo* does nothing more than to suggest that RCB service is more likely to be aligned with something short of 'warlike' service.

Other views expressed by Professor Stephens

15.49. In his letter to the RCBRG Chairman in 2022, Professor Stephens concluded that *a determination that the RCB deployment was conducted on a warlike basis* [was] *very supportable.*[326] In reaching this conclusion, it was clear to the Tribunal that Professor Stephens had relied upon three distinct elements: the *status of the armed conflict between the terrorists and Malaysian authorities*; *the weapons state* (or Degree of Weapon Readiness (DOWR)); and the *activation of 'war like' provisions of the then discipline legislation*.

The status of the armed conflict between the terrorists and Malaysian authorities

15.50. In discussing the conflict between the terrorists and Malaysian authorities, Professor Stephens relied on the proposition that the 'warlike' situation between CTs and the Malaysian Government constituted a threat to Butterworth. He stated that: *During the period in question, it is clear from academic analysis…that all of the criteria for Common Article 3…non-international armed conflict between insurgents and the armed forces of Malaysia were likely satisfied. Hence the threat level was objectively a high one in relation to these activities. Notwithstanding this threat level, it was open for the Australian Government to have restricted*

[325] The current national policy indicators are: *'XRAY—de-escalation. The Government intention is to minimise involvement in the situation to that necessary to achieve the mission; YANKEE—status quo. The Government intention is to use the ADF to maintain the current balance of power or to return to a previous status quo before destabilisation. Significant use of force to support specific objectives maybe authorised in conjunction with NPI YANKEE; ZULU—risk of escalation is acceptable. The Government intention is to authorise the use of force to achieve the mission, including change of the status quo to generate a more favourable environment. Implicit in the approval of NPI ZULU is political recognition that the military action may lead to an escalation of the crisis. NPI ZULU would be appropriate for warfighting operations.'* ADF-I-0, *Rules of Engagement*, Vice Chief of the Defence Force, 2021, Edition 3, AL1, paragraph 2.8

[326] Letter from Prof D. Stephens to Chairman RCBRG, *Rules of Engagement and Threat Levels re Butterworth Rifle Company Butterworth*, 14 June 2022, page 2. (Submission 65, RCB Review Group, p.64)

the authority for deployed RCB personnel to the limits of self-defence 'only' for the purposes of ensuring base security.[327]

15.51. The Tribunal's assessment of the likelihood of attack on Butterworth (provided in the preceding chapter) runs counter to the proposition that the threat levels were *objectively a high one.* Instead, the Tribunal found that the likelihood of attack on Butterworth was, for the most part, *unlikely* although in some limited circumstances attacks were assessed as being *possible*. Similarly, the Directorate of Air Force Intelligence consistently assessed the threat level at Butterworth to be *low*, even throughout the period immediately following rocket attacks in 1975 against nearby Malaysian military installations. The Tribunal did not agree that the threat to Butterworth was ever *high*.

RCB weapons state

15.52. Although the Tribunal noted that DOWR is not a constituent part of the 1993 definition of 'warlike' service, transition through the degrees of weapons readiness is clearly a necessary precursor to the *application of force*. Critically, Professor Stephens' assessment that a 'warlike' determination for RCB service was *very supportable* appears to have been based on information provided by the RCB Review Group that live ammunition was routinely chambered, this being the 'ACTION' condition.[328] Although there is some evidence that live ammunition was occasionally chambered, the standing DOWR that was authorised by ROE during RCB on-base operations was UNLOAD,[329] as indicated by the following extract from RCB Unit Standing Orders:

> 1. *Weapons are to remain UNLOADED during training reactions.*
> 2. *If reacted by the SP's* [Service Police] *on other than training tasks, you are to react with weapons UNLOADED.*
> 3. *Weapons are not to be LOADED unless ordered by the QRF Commander and then only if the requirement exists once the QRF reaches the KP* [Key Point]*, ie 'A REAL' emergency.*
> 4. *Weapons are only to go to the ACTION condition if danger is imminent.*
> 5. *Weapons are to be UNLOADED immediately it has been identified that there is no longer a threat.'*[330]

15.53. Despite this clear enunciation of QRF DOWR requirements, expressed as an order, the RCB Review Group's view of the QRF's DOWR was that was the QRF's degree of weapon readiness was always 'on order' from their immediate superior and, more particularly, that

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[327] Ibid.
[328] From Professor Stephens' comment that: *'I have been provided with information regarding the weapons state that applied during the RCB deployment, where live ammunition was chambered.'* Ibid.
[329] The Degrees of Weapon Readiness are: UNLOAD, LOAD, ACTION, INSTANT, FIRE.
[330] RCB Unit Standing Orders, Annex C, Appendix 2, *State of Weapons Readiness-QRF*, paras 1-5. Submission 96b, Department of Defence, Attachment E.

QRFs, standing patrols, sentries and ambush patrols were in the ACTION condition (magazine loaded and weapon cocked).[331] This view is not only clearly at odds with the Unit Standing Orders but also runs counter to the expectations of a former senior RAAF officer familiar with interaction between RAAF Air Defence Guards at Butterworth and the RCB, who expressed some surprise that some detachments had been at ACTION with live ammunition without danger being imminent.[332]

15.54. Although the Tribunal found few submissions that documented being at ACTION on base at Butterworth, it is possible that a number of events in which ACTION was directed may have occurred. However, the point remained that ACTION was not a routine DOWR, and the fact that some RCB detachments may have inappropriately implemented what was essentially a violation of Unit Standing Orders (inadvertently or otherwise) did not, in the Tribunal's view, provide a sound foundation for a conclusion that RCB service was 'warlike'.

'Warlike' provisions of the then discipline legislation

15.55. As discussed in more detail in Chapter 18, the fact that the Whilst on War Service (WOWS) disciplinary provisions were applicable during much of the period of RCB service is not determinative that such service was 'warlike' and was equally consistent with service being either 'peacetime' or 'non-warlike'.

15.56. Accordingly, the Tribunal considered that the three bases on which Professor Stephens' letter stated that *'a determination that the RCB deployment was conducted on a warlike basis* [was] *very supportable'* did not warrant a conclusion that RCB service was 'warlike'. Notably, in his evidence at the Brisbane hearing on 3 April 2023, Professor Stephens agreed that ascertaining the correct classification of RCB service *requires a deeper assessment of the threat level that operated at the time.*

Tribunal Conclusions

a) The initial RCB Rules of Engagement were issued in, and were arguably consistent with, the relatively benign threat environment of 1968.

b) Although two versions of RCB ROE sought to implement more forward-leaning ROE, ROE based upon RAAF Operation Order 1/1971 overrode both of these variants.

c) RAAF Operation Order 1/1971-based ROE were in force for the vast majority of the RCB tenure.

d) No QRF-specific ROE were ever generated.

[331] This was the RCBRG's formal response to the Tribunal's question *'What was the mandated degree of weapons readiness for RCB personnel while on duty?'*
[332] Oral Submission, Wing Commander Gary Penney (Retd), 3 April 2023.

e) OPORD 1/71 ROE can reasonably be considered to be *de-escalatory* or intended to maintain the *status quo.* These categories are not typically associated with 'warlike' service.

f) RCB authorised use of force was *limited to self-defence* in that only reactive engagement with a hostile force attacking personnel or assets was permitted.

g) The geographic and other limitations imposed on RCB were consistent with, and tended to confirm, that RCB ROE were *limited to self-defence*.

Chapter 16 Was RCB service 'Peacetime'?

Assessment by reference to the 1993 definitions

16.1. As indicated in Chapters 7 and 9, the Tribunal did not accept the Defence submission that, in the context of medallic recognition, there are only two classifications of service - 'warlike' and 'non-warlike (meaning other than warlike)'. In the view of the Tribunal, Defence adduced no legislative, Cabinet or informed Ministerial authority for that proposition.

16.2. Instead, the Tribunal believed there are three categories of service – 'warlike', 'non-warlike' and 'peacetime' - as approved by the 1993 Cabinet decision and not since negated. While the 1993 Cabinet decision only approved express definitions of 'warlike' and 'non-warlike', the definition of 'non-warlike' clearly recognised the third category of 'peacetime'.

16.3. While the classification of service may change over time as the circumstances in which it is performed change, it is apparent from the approved definitions that, at any point in time, service can only fall into one of the three classifications – that is, that they are mutually exclusive.

16.4. Although Cabinet did not approve an express definition of 'peacetime', the intention behind that classification can be nevertheless be gleaned from the terms of the definitions of 'warlike' and 'non-warlike'. In the Tribunal's view, analysis of those definitions supports the following propositions:

a. 'peacetime' service is service that does not meet the definition of either 'warlike' or 'non-warlike';

b. because the 'hazardous' sub-classification of 'non-warlike' involves *Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty*, 'peacetime' service is not necessarily free of hazard but may involve some hazard;

c. because 'non-warlike' service involves operations *where there is risk associated with the assigned task(s) and where the application of force is limited to self defence*, 'peacetime' service must be free of such risk that might justify the application of force; and

d. in order to reconcile the second and third of these propositions, the hazards that may be entailed in peacetime service must be ones that would not justify the application of force.

16.5. On this basis then, the Tribunal concluded that 'peacetime' service may involve hazards such as, for example, traffic accidents involving ADF vehicles, physical injuries while undertaking ADF training, and illnesses contracted while training in tropical environments. These are all hazards of the nature that might be faced while undertaking comparable activities

in civilian life unrelated to ADF service. Such hazards would not result in combat- or mission-related casualties, but might cause non-battle casualties.

16.6. In contrast, activities that involve a risk where the application of force is authorised would in the view of the Tribunal involve a hostile force.

16.7. Prior to 2011, Defence accepted that RCB service was 'non-warlike'. For that reason, it recommended that the Minister recommend to the Governor-General that RCB service be declared a 'non-warlike operation' under Australian Service Medal Regulations, and that it be determined to be 'non-warlike service' or 'hazardous' service under the VEA.

16.8. From 2011, Defence instead asserted that RCB service was 'peacetime'. Notably, however, until the Tribunal asked it to do so for the purposes of this inquiry, it never expressed any reasoning for that assertion by reference to the 1993 Cabinet-approved definitions. Nor did it ever refer to any other definition of 'peacetime' in support of that assertion.

16.9. It is clear from all of the historical evidence summarised in the NOS documents prepared over time that it was a purpose of the RCB deployment to provide additional security for RAAF personnel and assets in view of the apprehended possibility of an attack on Air Base Butterworth by CTs. Had CTs attacked the Base, they would undoubtedly have been a hostile force. While they may not have been an 'enemy' of Australia prior to such an attack, they would have become such once they launched that attack and the RCB would have been authorised to apply force to repel or defeat the attack (within the limitations on RCB application of authorised force).

16.10. The Tribunal thus concluded that it was self-evident that, in the context of the 1993 Cabinet-approved definitions, RCB service therefore could not be classified as 'peacetime'.

16.11. And because, as noted above, Defence put forward no alternative definition of 'peacetime', the Tribunal simply could not accept its assertions, post 2011 and during this inquiry, that RCB service was properly classified as 'peacetime'.

Assessment by reference to the 2018 definitions

16.12. As noted in Chapter 7, in 2018 the then Defence Minister approved 'updated' definitions of service classifications. These included a detailed definition of 'peacetime'. While the new definitions were expressly stated to apply only to service performed after the Minister's approval, the Tribunal considered it appropriate to assess whether the updated definitions would confirm or rebut the above conclusion formed by reference to the 1993 definitions. In this regard the Tribunal was particularly mindful that, in seeking the Minister's approval of the updated definitions, the CDF stated that *The 1993 framework ... remains practical for classifying ADF operations ... the new definitions do not alter the intent or direction provided by the 1993 definitions.*

16.13. The 2018 definitions stated that:

The nature of service (NOS) classification expresses the extent to which ADF personnel deployed on an ADF operation, or on a third country deployment, in a specified area and within a specified timeframe, are exposed to the risk of harm[1] from hostile forces[2] as a consequence of executing the approved mission and tasks.

Peacetime

A **peacetime** *classification acknowledges that an element of hazard and risk is inherent to ADF service and that personnel are appropriately trained and compensated for their specific military occupation. Service on* **peacetime** *operations is not the same as serving overseas on a posting or short-term duty.*

A **peacetime** *operation is an Australian Government authorised military operation or activity that does not expose ADF personnel to a Defence-assessed threat[3] from hostile forces.[4] Therefore, there is no expectation of casualties as a result of engagement with hostile forces. There may be an increased risk of harm from environmental factors consistent with the expectation that ADF personnel will from time to time perform hazardous duties.*

1 Harm. *The NOS classification of ADF operational service is based on an assessment of the level of exposure to the risk of harm – both physical and psychological – from hostile forces, but not environmental factors which are recognised elsewhere in the ADF remuneration framework and the conditions of service package.*

2 Hostile Forces. *Hostile forces comprise military, paramilitary or civilian forces, criminal elements or terrorists, with or without national designation, that have committed a hostile act, exhibited hostile intent, or have been designated hostile by the Australian Government.*

3 Threat Assessment. *For the purposes of the NOS definitions, the level of threat from hostile forces must be derived from an authorised assessment provided by the Defence Intelligence Organisation or Headquarters Joint Operations Command-J2.*

4 Terrorism. *A general threat of terrorism which does not specify a direct threat to ADF personnel does not predicate a higher NOS classification than peacetime. To classify an ADF operation as other than peacetime. To classify an ADF operation as other than peacetime based on terrorism, there must be a Defence identifies specific threat to the ADF presence.*

16.14. The key element of this definition is that a *peacetime operation is an Australian Government authorised military operation or activity that does not expose ADF personnel to a Defence-assessed threat*[3] *from hostile forces*. As a result, *there is no expectation of casualties as a result of engagement with hostile forces.*

16.15. Defence sought to argue in the submission set out at Appendix 6 that RCB service was 'peacetime' under the 2018 definitions. This was based on a number of reasons which set out below together with the Tribunal's assessment of them:

a) there is no documentary record of any attacks against Air Base Butterworth or Australian Defence Force personnel and assets at Air Base Butterworth throughout out the period 1970 to 1989.

But, as noted in Chapter 13 above, the 1993 definitions approved by Cabinet are prospective and not retrospective in nature and the Tribunal considered that the 2018 definitions are the same, given that they speak in terms of risk and expectation. Accordingly, the fact that a CT attack on the Base did not eventuate was viewed by the Tribunal as irrelevant.

b) Rifle Company Butterworth was not an authorised Australian Defence Force operation against a hostile force. The security tasks conducted by Rifle Company Butterworth were authorised, as were training activities.

In the Tribunal's view this statement was unsustainable. It is clear from the discussion of ROEs in Chapter 15 that RCB personnel were authorised to engage against a hostile force if the CTs mounted an attack on the Base.

c) The Joint Intelligence Organisation assessed that a communist attack on Air Base Butterworth, the work location of Rifle Company Butterworth, was unlikely and the threat was low.

But the 2018 definition provides that a peacetime operation *does not expose* ADF personnel to a *threat from hostile forces*. Clearly the CTs were a hostile force and the Base and RCB personnel were exposed to a threat of attack by them. That is all that is required to meet the 2018 definition – whether or not the threat was unlikely or low is irrelevant.

d) There was no expectation of casualties as there was not expected to be an engagement with hostile forces. Both Rifle Company Butterworth and Royal Australian Air Force aircraft were not authorised to be involved in internal Malaysian affairs nor therefore

drawn into direct contact with a hostile force.

Even if there was no *expectation of casualties* (which is discussed at greater length in Chapter 18), that is not sufficient to meet the definition of peacetime as there must also be no threat from a hostile force. The fact that ADF personnel were not authorised to directly/proactively engage the CTs is, in the view of the Tribunal, irrelevant as they were authorised to so engage if the CTs attacked the Base.

e) *There are no documented attacks against the Air Base Butterworth for the period under consideration and no related casualties.*

But, as already noted, this is an irrelevancy as the definition is based upon prospective threat and expectation rather than retrospective factual assessment;

f) *The environmental factors are consistent with the expectation that Australian Defence Force personnel will from time to time perform hazardous duties within a peacetime environment. Tropical weather and lengthy overnight duty do not alter a peacetime assessment.*

This may indeed be correct but it does not render an operation peacetime when there is exposure to a threat from hostile forces, as was clearly the case with RCB service.

g) *Communist terrorist activity in Malaysia over the period 1970 to 1989 is acknowledged. However, there is no evidence of a specific threat or intent from communist terrorists toward the Australian Defence Force presence at Air Base Butterworth. As noted in the 2018 definitions, "A general threat of terrorism which does not specify a direct threat to Australian Defence Force Personnel does not predicate a higher Nature of Service classification than peacetime".*

The Tribunal accepted that there is no evidence that the CTs were specifically targeting ADF personnel and assets, as opposed to Malaysian personnel and assets. But the contemporaneous assessment was that, if the CTs did attack ABB, they would likely not differentiate between Malaysian personnel and assets and Australian personnel and assets. And, in any event, the passages in the definition about terrorism apply only to classification of service *based on terrorism* and do not limit the more general application of the definition to exposure of a threat from hostile forces, which criterion was clearly met during RCB service.

16.16. Given that the RCB deployments were specifically ordered because ADF personnel and assets were assessed to be under threat of attack from CTs and that it was a purpose of the RCB that its members should respond to such an attack, the Tribunal was frankly incredulous that

Defence sought to argue that RCB service met the 2018 definition of 'peacetime'. By its own statements recognising that RCB service carried with it the threat of a CT attack, Defence should have realised that RCB service self-evidently could not be classified as 'peacetime' service under the 2018 definitions.

Assessment by reference to veterans' submissions

16.17. As mentioned in Chapter 8, many of the submissions from RCB veterans were directed to arguing against the Defence claim that RCB service was 'peacetime'. The Tribunal assessed that, in this regard, those submissions made many telling points as noted in the following discussion.

16.18. A number of submissions stressed the unique nature of RCB service, including the assertion that on no other occasion had Army forces been deployed to provide security for RAAF personnel and assets at RAAF bases, whether in Australia or elsewhere. Defence advised the Tribunal that it was aware of no such instance. [333]

16.19. Many veterans claimed that their RCB service was the only occasion in their military careers on which they had been issued with weapons and/or live ammunition for the purpose of garrison/guard duties. One submitter stated that he had been issued with a mattock handle when undertaking guard duties in Townsville.[334]

16.20. Many also stated that they had never operated under ROE while undertaking peacetime service in Australia.

16.21. In contrast, while it did not provide the Tribunal with any examples of ROE issued for peacetime garrison duty in Australia, Defence asserted that all peacetime operations were conducted under ROE and that:

> *The key difference in the Rules of Engagement for Rifle Company Butterworth and Australian garrison Rules of Engagement are the locations named in the orders and instructions.*

16.22. In this regard one submitter advised that he had made a Freedom of Information request of Defence seeking the information on which it relied in making this statement but that Defence had refused that request on the basis that locating the documents in question would *have a substantial and adverse effect on ADFHQ's ability to perform its usual functions* as it would require examination of 482,038 documents comprising approximately 7,230,570 pages in Defence's digital archives, let alone archived documents.[335]

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[333] Submission 96b, Department of Defence.
[334] Submission 119, Mr Kevin Metcalfe.
[335] Submission number withheld, Private.

16.23. In these circumstances, given Defence's apparent inability to readily and immediately substantiate the statement it had made to the Tribunal, the Tribunal was not prepared to accept that RCB service was performed under ROE materially the same as the basis on which peacetime garrison duty was performed in Australia.

16.24. Indeed, one submitter who had been the Garrison Commander for the Enoggera Army base and whose responsibilities included the security of the garrison advised the Tribunal that:

> *The suggestion that tasks undertaken by RCB were no different than those undertaken at Australian bases in peacetime is not supported by facts. During my 47 years of service in the Army I have been posted to or have trained at all of the major Army bases in Australia and I have never seen Army personnel involved in security duties carrying weapons or live ammunition. Further, at no time were ROE or OFOF issued. When I was the Garrison Commander at Enoggera Barracks I was responsible for issuing security orders for the garrison. Those orders explicitly prohibited the carriage of weapons and ammunition and ROE and OFOF were not issued.*

16.25. Other submitters noted the arrangements for medical support to RCB operations were notably different to those for peacetime deployment in Australia, involving more medically trained platoon members and additional and refreshed training pre-deployment, along with a requirement to carry a field dressing at all times.

16.26. And submitters also recorded that the degree of live fire training on RCB service, and the availability of live ammunition, far exceeded that experienced on peacetime service in Australia.

Overall Tribunal assessment of RCB service as 'peacetime'

16.27. For the reasons outlined above the Tribunal concluded that RCB service could not be appropriately classified as 'peacetime', either by the meaning of that term to be inferred from the 1993 definitions or if the express 2018 definition of that term had been applicable.

Chapter 17 RCB service and the 'non-warlike' definition Assessment by reference to the 1993 definitions

17.1. The 1993 Cabinet-approved definition of 'non-warlike' was as follows:

Non-Warlike

Non-warlike operations are defined as those military activities short of warlike operations where there is risk associated with the assigned task(s) and where the application of force is limited to self defence. Casualties could occur but are not expected. These operations encompass but are not limited to:

e. Hazardous. Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty such as mine avoidance and clearance, weapons inspections and destruction, Defence Force aid to the civil power, Service protected or assisted evacuations and other operations requiring the application of minimum force to effect the protection of personnel or property, or other like activities.

f. Peacekeeping. Peacekeeping is an operation involving military personnel, without powers of enforcement, to help restore and maintain peace in an area of conflict with the consent of all parties. These operations can encompass but are not limited to:

i. activities short of Peace Enforcement where the authorisation of the application of force is normally limited to minimum force necessary for self defence;

ii. activities, such as the enforcement of sanctions in a relatively benign environment which expose individuals or units to 'hazards' as described in sub-paragraph 2(a);

iii. military observer activities with the tasks of monitoring ceasefires, re-directing and alleviating ceasefire tensions, providing 'good offices' for negotiations and the impartial verification of assistance or ceasefire agreements, and other like activities; or

iv. activities that would normally involve the provision of humanitarian relief. [336]

NOTES:

3. Humanitarian relief in the above context does not include normal peacetime operations such as cyclone or earthquake relief flights or assistance.

[336] Cabinet Decision No 1691, Submission No 1021, ADF Personnel Deployed Overseas – Conditions of Service Framework, dated 17 May 1993. Document number 25.

4. *Peacemaking is frequently used colloquially in place of peace enforcement. However, in the developing doctrine of peace operations, Peacemaking is considered as the diplomatic process of seeking a solution to a dispute through negotiation, inquiry, mediation, conciliation or other peaceful means.*[337]

17.2. Given that the listing of hazardous and peacetime service are stated to be simply examples of 'non-warlike' service, it is apparent that the opening paragraph of the definition sets out the core criteria necessary to be met for service to be classified as 'non-warlike'. The relevant questions for the Tribunal were therefore:

a. did RCB service involve 'military activities'?;

b. was there risk associated with the assigned tasks of those activities?;

c. was the application of force authorised?;

d. was that authorisation limited to self defence?; and

e. could casualties occur even if not expected?

17.3. Successive NOS papers contain detailed analysis of historic documents discussing the purposes of RCB deployments. They concluded that three purposes were intended:

a. to maintain an ADF presence in Malaysia (both in support of Malaysian independence and as a pre-positioned force in the event of any external regional threat to Australia);

b. to training ADF personnel, both stand-alone and possibly jointly with Malaysian forces; and

c. to provide a 'quick response force and additional support for the security of ABB.

17.4. The NOS papers noted that, on occasions, the historic papers list these three purposes in a different order.

17.5. But, most relevantly, the base security purpose was consistently included.

17.6. The NOS papers, in confirming these three purposes, make it clear that assertions that RCB service was merely for training purposes are incorrect. Assertions to that effect were made on occasions for public presentation purposes for reasons of international and domestic expedience. The NOS papers and other original historical documents make clear that such

[337] Cabinet Decision No 1691, Submission No 1021, ADF Personnel Deployed Overseas – Conditions of Service Framework, dated 17 May 1993, Attachment B following the end of (b). Document number 25.

public presentation was not a true indicator of the purpose and role of the RCB. Whether or not those assertions were justifiable is not a matter on which the Tribunal considered it appropriate to offer any comment. However, the Tribunal did consider that the value of RCB's purpose was publicly understated and that it was appropriate that it should now clearly acknowledge that value.

17.7. For its part and as already noted elsewhere, the Tribunal believed that the immediate and proximate purpose of RCB deployments was to provide additional base security beyond the assessed capacity of the RAAF and the Malaysian forces – that is, the additional base security was the *sine que non* and RCB deployments would not have occurred had the capacity of the RAAF and the Malaysian forces been assessed as adequate. Because adequate base security was a necessary condition for the continued RAAF presence in Malaysia and because the primary purpose of the RAAF deployment was to maintain an ADF presence in Malaysia, the RCB thus took on that purpose also. And, given that engagement with hostile forces was only a risk rather than a current ongoing action, it would have been irresponsible to leave RCB members unoccupied when not called on for such active engagement and so training (both for the base security purpose and for other more general infantry duties) was quite properly another purpose.

17.8. But, whatever the ranking of purposes, the key issue for the Tribunal was that there was a clear purpose of proving additional base security. The definition of 'non-warlike' does not convey any sense that the military activity generating risk that might require the application of force must be the sole or predominant purpose for service to be classified as 'non-warlike'. It is sufficient if it is a purpose.

17.9. There can in the Tribunal's view be no doubt that RCB service involved military activities and that has never been challenged by Defence. Safeguarding the security of RAAF personnel and assets deployed overseas in a potentially hostile environment is undoubtedly a core military activity.

17.10. Because RCB deployments were in response to an assessed threat of a CT attack on Air Base Butterworth (discussed in detail in Chapter 14), it followed of necessity that there was a risk associated with the assigned task of providing additional base security – the risk that CTs might attack the air base and that RCB members and other Australian personnel or assets might be adversely affected.

17.11. In response to that assessed threat, various versions of ROE were issued to RCB over the period 1970 to 1989, as discussed in Chapter 15. These clearly authorised the application of force in the event of a CT attack on ABB.

17.12. The discussion in Chapter 13 and the analysis in Chapter 15 also led to the clear Tribunal conclusion that the RCB's ROE were *limited to self-defence*.

17.13. And, clearly, if the apprehended attack on the air base occurred, there could be combat- or mission-related non-battle casualties, whether by death or disabling wounding. The CTs

were known to have personal weapons and there was speculation that they might also have had access to or have obtained mortar launchers and ammunition. Casualties were an obvious possibility.

17.14. On first principles then, the Tribunal considered that RCB service met at least the definition of 'non-warlike'. That conclusion is consistent with the position adopted by Defence in recommending that RCB service be declared as a 'non-warlike operation' and recognised by the ASM and the ASM 1945-1975 and also determined to be 'non-warlike service' or 'hazardous' under the VEA.

17.15. However, contrary to that position, in its assessment against the 1993 Cabinet-approved definition of 'non-warlike' (at Appendix 6), Defence sought to argue in this inquiry that RCB service was not 'non-warlike'.

17.16. In that assessment, Defence raised various points summarised below, together with the Tribunal's comments on them:

a) ***The Joint Intelligence Organisation always assessed the threat of communist terrorist attack on Air Base Butterworth as LOW and unlikely.***

This acknowledgement by Defence meant that the first element of the sentence of the 1993 definition was met.

b) ***Rifle Company Butterworth Rules of Engagement were defensive, which included the right of self-defence.***

This acknowledgement by Defence meant that the second element of the sentence of the 1993 definition was met (having regard to the discussion of *self defence* in Chapter 13). While Defence did not discuss in its assessment whether *Casualties could occur but are not expected*, it is self-evident that casualties were not impossible in the event of a CT attack on ABB. Accordingly, these two acknowledgements by Defence were sufficient to show that the 1993 definition of 'non-warlike' was met, given that the balance of the definition text discusses non-exhaustive examples of the hazardous and peacekeeping subsets of 'non-warlike' service.

c) **Defence argued that RCB service was not 'hazardous' because**

- ***There is no record of security emergency being declared at Royal Australian Air Force Base Butterworth over the period;***
- ***The Quick Reaction Force, which was exercised frequently, was never called to action in response to an actual documented intrusion by an adversary;***
- ***Normal daily life for the Royal Australian Air Force families continued throughout the period;***

- ***The officers and Sergeants Mess were located adjacent and off Air Base Butterworth and had no security restrictions imposed;***
- ***Single (unaccompanied) Royal Australian Air Force personnel were permitted to live off base;***
- ***Throughout the period 1970 to 1989 the Royal Australian Navy continued to make peacetime calls and conduct routine leave ashore;***
- ***Rifle Company Butterworth personnel were allowed to visit bars, restaurants and shops in Butterworth town and on the island of Penang. No additional security measures were taken for these visits.***

In the Tribunal's view, each of these points, even if factually correct, was either irrelevant or reflected a misconception by Defence of the nature of the threat environment and of the proper interpretation of the definition. As discussed in detail in Chapter 14, the threat was of an attack by CTs on the Air Base, not on ADF personnel off-base. The fact that such an attack did not eventuate was in the view of the Tribunal irrelevant in interpreting a definition that focusses on risk and possibility and does not call for assessment after the event with the wisdom of hindsight.

d) ***RCB service was not peacekeeping service***

This is undoubtedly correct, but that does not mean that it was not non-warlike.

e) ***While live ammunition was carried, there was no intent to use the ammunition unless absolutely necessary for defensive purposes.***

The Tribunal assessed this position as correct, but that of itself adds weight to and does not detract from a conclusion that RCB service met at least the 1993 definition of 'non-warlike'.

17.17. The Tribunal therefore considered that it was clear that RCB service met at least the 1993 definition of 'non-warlike' and that accordingly the real question for consideration was whether it went beyond that and could be assessed as meeting the 1993 definition of 'warlike'.

Assessment by reference to the 2018 definitions

17.18. As it did in the preceding chapter concerning 'peacetime' service, the Tribunal also considered the arguments raised by Defence based on the updated 2018 definition of 'non-warlike' which is in the following terms:

The nature of service (NOS) classification expresses the extent to which ADF personnel deployed on an ADF operation, or on a third country deployment, in a

specified area and within a specified timeframe, are exposed to the risk of harm[1] from hostile forces[2] as a consequence of executing the approved mission and tasks.

Non-warlike

Non-warlike *service exposes ADF personnel to an indirect risk of* **harm** *from* **hostile forces**.

*A **non-warlik**e operation is an Australian Government authorised military operation which exposes ADF personnel to the risk of **harm** from designated forces or groups that have been assessed by Defence as having the capability to employ violence to achieve their objectives, but there is no specific threat or assessed intent to target ADF personnel. The use of force by ADF personnel is limited to self-defence and there is no expectation of ADF casualties as a result of engagement of those designated forces or groups.*

> *1* Harm. *The NOS classification of ADF operational service is based on an assessment of the level of exposure to the risk of harm – both physical and psychological – from hostile forces, but not environmental factors which are recognised elsewhere in the ADF remuneration framework and the conditions of service package.*
>
> *2* Hostile Forces. *Hostile forces comprise military, paramilitary or civilian forces, criminal elements or terrorists, with or without national designation, that have committed a hostile act, exhibited hostile intent, or have been designated hostile by the Australian Government.*
>
> *3* Threat Assessment. *For the purposes of the NOS definitions, the level of threat from hostile forces must be derived from an authorised assessment provided by the Defence Intelligence Organisation or Headquarters Joint Operations Command-J2.*
>
> *4* Terrorism. *A general threat of terrorism which does not specify a direct threat to ADF personnel does not predicate a higher NOS classification than peacetime. To classify an ADF operation as other than peacetime. To classify an ADF operation as other than peacetime based on terrorism, there must be a Defence identifies specific threat to the ADF presence.*

17.19. In its assessment against this definition at Appendix 6 Defence made a number of points which are summarised below, together with the Tribunal's assessment of them:

a) While violence by CT was recorded as utilised against Malaysian authorities, there were no attacks against Australian Defence Force or civilian personnel or equipment, including unarmed off-duty personnel and their families moving freely

within the local community and touring Malaysia.

The Tribunal considered that there were two problems with this statement. First, the fact that no CT attack eventuated was irrelevant when assessing whether there was risk from a threat. Secondly, the fact that there were no attacks against Australian personnel misconceived the nature of the threat which was against ABB and, thereby, collaterally against Australian personnel and assets.

b) Rifle Company Butterworth was not authorised to conduct offensive operations.

This may be relevant to whether or not RCB service was 'warlike' but the Tribunal considered that it did not preclude RCB service being 'non-warlike' if there was a risk of harm from CTs with the capability to employ violence.

c) The Rules of Engagement for Rifle Company Butterworth were defensive.

This confirmed the applicability of the definition if there was a risk of harm from CTs with the capability to employ violence.

d) Normal daily life for the Royal Australian Air Force families and community continued throughout the period.

Again, this misconstrued the nature of the threat, which was to ABB rather than focussed on ADF and associated individuals.

e) The Joint Intelligence Organisation always assessed the threat of communist attack in Air Base Butterworth as LOW and unlikely.

The Tribunal considered that this acknowledgement confirms rather than rebuts the applicability of the 'non-warlike' definition. Nothing in the definition requires that a threat be of any particular magnitude, such as imminent. The mere existence of a risk of harm is sufficient.

f) Rifle Company Butterworth was not under any indirect risk of harm.

While the 2018 definition states that *'non-warlike' service exposes ADF personnel to an indirect risk of* harm (emphasis added), the Tribunal was not sure what the term 'indirect' was intended to mean. The definition contains no explanatory note of relevance and Defence did not comment on it in its assessment of RCB service against the definition. There was direct combat between the Malaysian forces and the CTs, but not between the ADF and the CTs. If there was an attack on the base, then RCB and potentially other ADF

groups would then engage in direct combat. But, until that time, it would seem that RCB members must have been exposed to an indirect risk of harm. What is clear from the detailed discussion of the threat environment in Chapter 14 is that RCB personnel were at risk of at least indirect harm and the Tribunal therefore did not accept the contrary proposition by Defence.

g) Communist terrorist activity in Malaysia over the period 1970 to 1989 is acknowledged. However, there was no evidence of a specific threat or intent from communist terrorists toward the Australian Defence Force presence at Air Base Butterworth, as noted in the nature of service non-warlike definition, "A general threat of terrorism which does not specify a direct threat to Australian Defence Force personnel does not predicate a higher Nature of Service classification than peacetime".

The Tribunal considered that this statement misconstrued the 2018 'non-warlike' definition. Terrorists are clearly defined as a hostile force, and it is clear that there does not have to be a specific threat or assessed intent to target ADF personnel so long as there is a risk of harm. The quoted sentence is confined to a *general threat of terrorism* (emphasis added) and cannot be construed as denying 'non-warlike' classification where those pre-conditions are met. During RCB service there was an assessed threat of a CT attack on ABB in which event it was possible that Australian personnel might incur casualties and ADF assets might be adversely affected. In the Tribunal's view, this goes beyond being merely a *general* threat of terrorism.

17.20. As to the balance of the definition, the Tribunal considered that it was clear that the risk of harm to which RCB members were exposed was from designated forces or groups that had been assessed by Defence as having the capability to employ violence to achieve their objectives, although there was no specific threat or assessed intent to target ADF personnel. Had there been no such risk assessed by Defence, then RCB deployments would simply never have been ordered. The need for increased base security against the threat of a CT attack was the very reason why RCB was formed.

17.21. In light of the above, the Tribunal was completely satisfied that RCB service, at the very least, met the 2018 'non-warlike' definition, as well as the 1993 definition. Whether it exceeded the requirements of either of the definitions of that term so as to meet the definition of 'warlike' is considered in detail in the following Chapter.

Assessment by reference to veterans' submissions

17.22. As noted in Chapter 8, submissions from individual veterans focussed on arguing against the Defence assertion that RCB service was 'peacetime' and for the proposition that it was 'warlike'. None gave any consideration of the possibility that it might meet the

intermediate classification of ‘non-warlike’, at least until the Tribunal raised that issue during public hearings.

17.23. Similarly, submissions from RCB representative organisations did not address that possibility until it was raised by the Tribunal. And when they did then address it, they largely did so by arguing that, because RCB service met the ‘warlike’ definition, it was not ‘non-warlike’.

17.24. Accordingly, veterans’ submissions of relevance are dealt with in Chapter 18.

Overall Tribunal assessment of RCB service as ‘non-warlike’

17.25. For the reasons discussed above, the Tribunal concluded that RCB service was at least ‘non-warlike’ by reference to the 1993 definition of that term, and would equally be assessed as at least ‘non-warlike’ if the 2018 definition was applicable.

17.26. If RCB service could not also meet the ‘warlike’ definition, this would mean that it did not meet the qualifying criteria for an Australian Active Service Medal but that it should be declared to be ‘non-warlike service’ under the VEA and thereby attract the more favourable claims treatment intended by Minister Billson in 2007.

17.27. Whether RCB service was more than ‘non-warlike’ and can be appropriately classified as ‘warlike’ is therefore considered in the following chapter.

Chapter 18 Was RCB service 'warlike'?

The 1993 definition

18.1. The 1993 Cabinet-approved definition of 'warlike' is as follows:

> ***Warlike***
>
> *Warlike operations are those military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties. These operations can encompass but are not limited to:*
>
> *f. a state of declared war;*
>
> *g. conventional combat operations against an armed adversary; and*
>
> h. *Peace Enforcement operations which are military operations in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and may be engaged in combat activities. Normally, but not necessarily always they will be conducted under Chapter VII of the UN Charter, where the application of all necessary force is authorised to restore* peace and security or other like tasks.

18.2. Given that 'non-warlike' service involves *military activities short of warlike operations,* it is apparent that warlike operations must be more than 'non-warlike' operations. In context, this seems to require that the degree of risk to which ADF members are exposed in a 'warlike' situation must be greater than that to which they are exposed in a 'non-warlike' situation.

18.3. And, given that casualties *could occur but are not expected* in 'non-warlike' operations, the degree of likelihood of casualties must be above mere possibility in order for there to be an *expectation of casualties* which is necessary for a military activity to meet the 'warlike' definition.

18.4. The analysis of the RCB's ROE set out in the Chapter 15 clearly shows that the application of force by RCB was authorised in the event of an attack on ABB.

18.5. Moreover, that authorisation was 'to pursue military objectives', being the protection of Australian military personnel and assets. There is nothing in the 'warlike' definition that specifies or implies that a limitation on the authorisation of force to self defence confines relevant service to being categorised as 'non-warlike' or precludes it being categorised as 'warlike'

18.6. The non-exhaustive list of 'warlike' service included in the definition includes *a state of declared war, conventional combat operations against an armed adversary* and *Peace Enforcement.*

18.7. In a *state of declared war* it would seem to be incontrovertible that the opposing forces each have a proactive capacity to engage the other rather than being limited to a merely reactive capacity. Australia never declared war against the CTs and, as discussed in Chapter 15, the RCB's ROE were confined to a reactive self-defence capacity.

18.8. In the phrase *conventional combat operations against an armed adversary* it is not immediately clear what the word *conventional* means but, when combined with the phrase *against an armed adversary,* this would again seem to suggest a proactive rather than merely reactive capacity such as that conferred by the RCB ROE.

18.9. RCB service was clearly not *peace enforcement*, but the fact that such operations are defined to allow belligerents who may not be consenting to intervention to be *engaged in combat activities* is again suggestive of suggest a proactive rather than merely reactive capacity.

18.10. It thus seems to be a common thread in this list that those engaged in these forms of 'warlike' operations have a proactive rather than merely reactive capacity to engage with a hostile force.

18.11. But, even if that is correct, it does not mean that RCB service cannot be 'warlike' because, as noted above, the list is stated to *encompass* but not to be *limited to* those three forms of warlike operations.

18.12. Accordingly, in this Chapter the Tribunal sets out its detailed consideration to whether or not RCB service was sufficiently more than 'non-warlike' service to give rise to an *expectation of casualties*.

Defence assessment against the 1993 'warlike' definition

18.13. At the Tribunal's request, Defence provided an assessment of RCB service against the 1993 'warlike' definition. This is contained at Appendix 6. It made a number of arguments against RCB service being 'warlike' which are summarised below, together with the Tribunal's assessment of them:

a) The application of force that 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.

The Tribunal agreed that the RCB ROE were *limited to self-defence* and that the primary RCB role was limited to the confines of ABB (although there was a capacity for authority to be given for the RCB to operate outside the base perimeter). But the Tribunal did not agree that this meant that RCB duty was *not designed to pursue military objectives.* The Tribunal considered that it was inherent that the protection of ADF personnel and assets from attack by a hostile force was a military objective. The fact that RCB was not authorised

to operate proactively off-base did not change that.

b) ***The 1978 Unit Standing Orders for Rifle Company Butterworth directed Rifle Company Butterworth personnel that 'if in doubt, do not shoot', reinforcing the careful consideration of the challenging domestic security of the air base, its proximity to the civilian population, development of housing and active farming adjacent the airstrip.***

The Tribunal did not consider these factors to be of significance to the issue of whether or not RCB service was 'warlike'. It is clear that there are internationally agreed limitations on what combatants may do in warlike operations, and individual nations may choose to impose additional limitations if they wish without the consequence that affected operations are no longer warlike.

c) ***The Australian Defence Force standing Rules of Engagement includes the right of self-defence activities domestically and whenever employed.***

The Tribunal considered this to be largely irrelevant. The fact that there is a right to self-defence in peacetime service does not mean that the same right is not present on 'non-warlike' or 'warlike' service.

d) ***There was no record of an expectation of casualties from Rifle Company Butterworth rotations.***

The Tribunal did not find any contemporaneous record expressing an expectation of casualties. But this does not mean that such an expectation cannot be inferred from other evidentiary material, or that it should not have arisen.

e) ***Non-battle casualties, including deaths by traffic accidents or misadventure, are not relevant to nature of service assessments.***

The Tribunal agreed that the casualties contemplated by the 1993 and 2018 definitions, in context, are limited to casualties arising from engaging with a hostile force.

f) ***Australia did not declare or recognise that a state of war exited in Malaysia and was not involved in internal Malaysian affairs.***

The Tribunal agreed with this. However, it considered that it only meant that RCB service cannot be classified under the *state of declared war* sub-set of

'warlike' service.

g) Rifle Company Butterworth did not conduct authorised conventional or any other combat operations against any adversary. Rifle Company Butterworth carried out garrison (in similar terminology – Port, Base, or Barracks) security duty and was not authorised to carry out patrols, i.e. searching for an adversary, outside Air Base Butterworth.

As discussed earlier in this chapter, the Tribunal considered it to be at least arguable that RCB service did not fall within the conventional combat operations against an armed adversary sub-set of 'warlike' service because RCB ROE did not authorise proactive rather than merely reactive engagement with a hostile force. But the Tribunal did not agree that the RCB ROE did not authorise *any other combat operations against an adversary*. It considered that it was indisputable that, if ABB was subject to a CT attack, RCB was authorised to engage in combat operations against the CTs. For the reasons set out in Chapter 16, the Tribunal rejected the Defence contention that RCB service was *garrison (in similar terminology – Port, Base, or Barracks) security duty* that should be properly classified as 'peacetime' service.

h) Rifle Company Butterworth service was not a Peace Enforcement operation.

The Tribunal agreed with this statement.

i) The overall risk associated with Rifle Company Butterworth security and training tasks was low.

The Tribunal's assessment of the threat environment in which RCB operated is set out in Chapter 14.

18.14. In the Tribunal's view, the Defence assessment against the 1993 'warlike' definition was inconclusive because it left open the issue of whether or not the nature of RCB service involved an *expectation of casualties*.

Submissions arguing that RCB service was 'warlike'

18.15. Submissions from RCB veterans and the organisations representing them drew the Tribunal's attention to many features of RCB service that the authors clearly felt to be relevant to a 'warlike' classification. Accordingly, the Tribunal considered, as set out below, whether these features supported an assessment that RCB service was *more than* 'non-warlike'.

Pre-deployment briefing

18.16. Very many submissions drew attention to the briefing they received before leaving Australia on deployment to ABB. Defence advised that it had been unable to locate any documents setting out 'scripts' for such briefing, and it did not contest anything said on this topic by RCB veterans in their submissions to the Tribunal. A common thread in these submissions was that RCB members were informed that their deployment was *the real thing* and that they were being sent to counter an enemy force in the event of a CT attack on the base.

18.17. Some said that they recalled being advised that they were being *called out for war service* or *Officially Warned Out for Active Service*,[338] although the Tribunal considered that reference to 'war service' in these briefings was more likely in the context of discussing the disciplinary procedures that would be applicable (discussed below).

18.18. However, one submitter stated that *we were briefed on entering an active war zone and the possibility of contact with enemy CT forces. We were told we were deploying on war service by numerous SNCO's and Company Officers and told we were lucky because this would give us qualifying service.* [339] Another submitter said that they were told they *would be going for 93 days to make sure we received War Service Benefits.*[340] Yet another said *we were told by the battalion commanders that we were going on war service.*[341]

18.19. In contrast, another submitter said that his deployment had been briefed by the CO of 6 RAR on *the effort he was working on to have the service at ABB upgraded.*[342] Another submitter said that their commanding officer said that *there would be no recognition of warlike service, despite warning us that we would be going into a war zone and that we had rules of engagement that authorised us to shoot to kill, … the carrying of live ammunition, the expectation of casualties, war service discipline, the wearing of identity discs and the completion before departure of our wills, in addition to being DP1 ready.*[343]

18.20. It is apparent that there was some variation in the pre-deployment briefing provided to various RCB Members. There may have been some confusion amongst those being briefed about a distinction between service classification and disciplinary procedures. And there may have been some wrong advice given – no briefing officer would have been authorised to advise that RCB service was 'warlike' when it had not been declared as such.

18.21. Briefing that highlighted the risks entailed in a possible CT attack was clearly appropriate, but was equally applicable to either a 'non-warlike' or a 'warlike' threat environment.

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[338] Submission 105, Mr Robert Rasmussen.
[339] Submission 11, Mr John Summers.
[340] Submission 19, Mr Trevor Wharton.
[341] Submission 44, Mr Mark Stewart.
[342] Submission 32, Colonel Garry Cook (Retd).
[343] Submission 49, Mr Leslie Ray.

Pre-deployment training

18.22. Many submissions made reference to the training that was undertaken prior to deployment. A number of these asserted that the training undertaken before deployment to ABB was the same as that for Vietnam. For example, one submitter said *no soldier was permitted to go to the Vietnam theatre (as infantry) unless he first attended Canungra Jungle Training. Every soldier deployed to RCB, likewise, attended identical jungle training at Canungra*.[344]

18.23. Another submission said that *before deployment I was trained in how to conduct operations in a suburban environment, cordon off and search buildings and vehicles, identify materials that could be used in bomb-making, and deploy my section to protect buildings and other areas of importance*,[345] while another said *our pre-deployment training included crowd and riot control featuring a British Military film showing the use of rifle fire to quell a riot.*[346]

18.24. In the Tribunal's opinion there was nothing in any of the statements made about pre-deployment training that was conclusive of RCB service being 'warlike' and not 'non-warlike'. Some of it was clearly attuned to the specific nature of the tasks expected to be undertaken while on duty at ABB.

Pre-deployment DP1 requirements

18.25. Many submissions drew attention to the fact that those selected for RCB deployment were required to be at Deployment Preparedness Level 1 (DP1).

18.26. A 'DP1 Checklist' provided to the Tribunal at the Brisbane hearings listed the many things that were required before an individual attained DP1 status. These included confirming that personnel records correctly included many details (including religion, blood group, next-of-kin, lodgement of a will), whether an appointment had been made with a padre, medical details (including vaccinations), dental health, kit issued and storage of personal possessions.

18.27. Many RCB veterans drew particular attention to various aspects of these DP1 requirements, and particularly to the requirement that they either had a current will or alternatively had signed a form to indicate that they had been so advised but had declined to do so. Many said that they found this to be a confronting reinforcement of the fact that they were being sent into an environment where there was a risk that they might not return.

18.28. For its part, Defence asserted that DP1 requirements had to be met in a variety of circumstances and were not specific to 'warlike' or 'non-warlike' service. Defence provided a copy of a standing instruction in relation to the ADF requirements for a will which stated that

[344] Submission 8d, Mr Sean Arthur.
[345] Submission 99, Mr Leslie Morgan.
[346] Submission 105, Mr Robert Rasmussen.

Units are to ensure that each member on full duty who is eligible to make a will is advised and encouraged to do so.[347]

18.29. One submission noted that RCB members had to be at least 18 years of age and said this was because of the requirement in section 59 of the Defence Act.[348] That section provides that a person aged between 18 and 60 is liable to serve in the Defence force conscripted under section 60 of the Act in time of war. However, that section does not mean that persons under the age of 18 are not liable to serve as directed in the Defence Force, and does not mean that service by persons of or over 18 years of age is 'warlike'. Rather, it confines the ability of the Government to conscript people into the ADF.

18.30. In the view of the Tribunal, a requirement that ADF members be of DP1 status before being deployed to particular service was, at best, an indication that the service in question was unlikely to be 'peacetime' and is certainly not consistent only with it being 'warlike'.

Whilst on War Service – WOWS

18.31. Many submissions drew attention to the fact that they had been advised, both pre-deployment and on-deployment, that their service was *Whilst on War Service*. For example, one submitter in describing his pre-deployment briefing, said: *Then came the conduct and discipline talk where we were told that as we are on war like service we will be charged under the "Whilst on War Service act" and that penalties will be a lot tougher and much more expensive. So by now I am thinking to myself "this is not a game this is real and I better wake up to myself.*[349] Another submitter stated that *I was charged for a military offence whilst at RCB in 1985 and I was awarded punishment that was above what I would have received back in Australia and told the reason for this was because we were on war service.*[350]

18.32. At first glance, this appeared to be a clear indication that RCB service was 'warlike'. However, a little research shows this not to be the case.

18.33. Until the introduction of the *Defence Force Discipline Act 1982,* section 54 of the Defence Act provided that:

> *Members of the Military Forces, whether on war service or not, while*
>
> 1. *serving beyond the territorial limits of Australia*
> 2. *...*
>
> *shall be deemed to be on war service and are subject to the Army Act with such modifications and adaptations as are prescribed.*

[347] Excerpt of Army Routine Order 120-71, *Wills – Making Custody and Disposal*, Submission 96b, Department of Defence Annex 7.

[348] Submission number withheld, Private.

[349] Submission 12, Mr Malcolm Layt.

[350] Submission 72, Mr Ricky Karaitiana.

18.34. As a result, the deeming of Army personnel serving overseas to be on *war service* was simply a legislative expedient to allow application of summary disciplinary measures and was not a determination of service classification relevant for present purposes. This was made clear in the explanatory memorandum for the *Defence Force Discipline Bill 1982* where it was stated that:

> *The Army*
>
> *44. There are currently 2 codes of discipline for the Army. When members of the Army are on war service they are subject to the British code. The expression "war service" is something of a misnomer because for this purpose it not only includes service in times of war, but also active service and all service outside Australia in times of peace (sec DA 54).*

18.35. One submitter stated that*: I understand the concept of the warning order but during my 6 years in the Battalion during the 1970's I did a total of 3 overseas trips. Malaysia, Hawaii and New Zealand. All of these were as company size units but only prior to going to Butterworth was it ever considered necessary to advise we were "on War Service" for discipline reasons.*[351] However, it would seem that, whether or not those on those other deployments in the 1970s were advised, section 54 of the Act would have applied to deem those concerned to be *on war service.*

18.37. In a similar vein, at the hearings in Brisbane, RCB representatives noted that they had been on other overseas postings and had not been advised that their service was categorised as *Whilst on War Service*. If those other postings had been after the introduction of the *Defence Force Discipline Act 1982,* that would be correct; alternatively, if they were prior to that Act coming into force, it may be that the individuals concerned were simply unaware of the deeming provision in section 54 being applicable to their service.

18.38. The Tribunal thus concluded that a disciplinary status of *whilst on War Service* was not conclusive that RCB service was 'warlike' as it was equally consistent with it simply being service overseas, however classified.

On-deployment briefing

18.39. Many submitters noted that, on arrival at ABB and periodically during their deployment, they were briefed about the security situation. It is apparent that briefings on arrival involved familiarisation with the physical layout of the base, and reinforced the RCB's role, particularly in relation to its QRF function. Subsequent briefings provided an update on incidents on-base or elsewhere in Malaysia.

[351] Submission 52, Mr Mark Butler.

18.40. One submitter[352] drew attention to Annex B to HQ FF CMD Staff Instruction 2/79 of 6 July 1979, *Pre-Deployment Security Training* which stated that training and familiarisation at Butterworth needed to cover:

i. searchlight and generator instruction;

j. familiarisation with key points;

k. appreciation of the enemy threat and likely approaches; and

l. *quick reaction exercises*.

18.41. Not surprisingly, RCB commanders had greater access to intelligence of CT-related activity than the junior ranks, but it is clear that all ranks were at all times made aware that there was a risk of a CT attack and that they needed to be alert and careful. For example, another submitter stated:

> *I remember being regularly told that there were communist terrorist in the district surrounding Butterworth Air Base. However, exactly what the risk was of contact or danger was not really explained, other than that there was an active communist terrorist insurgency in the outlying provinces and jungles. ... I have no recollection of exactly where the danger was or where it was coming from other than that there were communist terrorists out and about and whatever you do, don't go near the kampongs. So we only went to Georgetown and never alone.*[353]

18.42. There was nothing in any of the submissions on this issue that the Tribunal considered to be inconsistent with the briefing that would be expected on a 'non-warlike' deployment (i.e., one that is more dangerous than 'peacetime' service and may be 'hazardous'), and nothing that was consistent only with a 'warlike' operation.

Briefing on Rules of Engagement

18.43. It was apparent from very many submissions that the attention of RCB members was frequently drawn to the ROEs under which they operated. The details of those ROE as they applied over the full period 1970 to 1989 are discussed in Chapter 15. However, it is also apparent that the core messages conveyed in or drawn from those briefings differed.

18.44. For some, it seems that the most significant element was the authority to employ lethal force; for others the geographic limitations on the RCB were important; some were concerned about the risk to which they would be exposed while challenging a suspected terrorist three times in Malaysian before the application of force was authorised; many stated that they were never briefed on the direction to *shoot to wound and not to kill* and only heard of it during this inquiry; yet others were concerned that the weapons with which they were issued were

[352] Submission 8d, Mr Sean Arthur.
[353] Submission 48a, Mr Christoph Berg.

incapable of being used with sufficient precision to achieve non-lethal wounding – as one submitter put it: *I, myself, never operated under a "shoot to wound" restraint by our ROE on my deployment. The very idea that such a thing was even possible is ludicrous*.[354]

18.45. It was also apparent that there were some misconceptions about the ROE. For example, one submitter stated that:

> *It has been stated that our ROE was defensive only, I would counter that by stating in the matter of encountering a lone person be it identified enemy or some other belligerent then the ROE would be used in its Standing order format/manner. Challenge 3 times before firing. If, however, the QRF was activated to an actual enemy incursion where shots had been fired or not; I would say that the ROE in its legal form would and could not be met. The ROE was not defensive only if used in that scenario. Once the QRF is activated it is impossible by virtue of the role of a QRF to have an ROE that is defensive only, as it is a reactive force.*[355]

18.45. And another submitter stated:

> *Having ROE can only exist in a war setting. You are at war, you have an enemy, and if the enemy is not compliant and declines to follow your simple directions, you are required to shoot him. I have spent literally years and years performing guard duty in Australia, and in two different battalions. But, naturally, my service in Australia wasn't warlike, so ROE was never contemplated. The requirement for lethal engagement rightfully only belongs in a war setting. Outside of a war, the idea is a dangerous nonsense.*[356]

18.46. Notwithstanding all of the above, the Tribunal believed that the RCB's ROE, while they may have differed a little over the period 1970 to 1989, were at all times *limited to self-defence*. Such ROE are consistent with 'non-warlike' service but that fact alone does not conclusively prevent service being 'warlike'. Whether RCB service can be classified properly as 'warlike' is the focus of the balance of this chapter.

RCB medical capability

18.47. A number of submissions drew attention to the degree of medical capability, training or resource within the RCB itself – that is, over and above the medical support provided by 4 RAAF Hospital Butterworth. For example:

[354] Submission 8c, Mr Sean Arthur.
[355] Submission 1b, Mr Michael Connolly.
[356] Submission 8c, Mr Sean Arthur.

Commensurate with the Threat, Company B was deployed to ABB at full strength with additional medical and specialist support.[357]

It is notable that despite the large and very capable medical presence at Butterworth provided by No 4 RAAF Hospital, it was a requirement that Rifle Companies deployed with their integrated combat medics. HQ Field Force Command Staff Instruction 2/79 requires each RCB rotation to deploy from Australia with a strength of 132 personnel and a structure based on Establishment 4001-XX-2. (A standard Infantry company). Paragraph 7 of the document requires:

[The deployment] "is to contain the following personnel:

a. two medical orderlies;
b. one storeman familiar with ammunition handling, storage and accounting procedures, (see also para 92);
c. one fitter armament;
d. six drivers, including at least one NCA, with B5 endorsed Army driving licences;
e. one physical training instructor;
f. three RAE tradesmen, including at least one carpenter, and
g. two military policemen, RACMP, including one qualified as an investigator."

I anticipate that most Rifle companies deployed with their three allocated stretcher bearers (from the Battalion Pipes and Drums/Band) as mine did in 1982. Together with two medical orderlies (now known as combat medics) this provided a considerable integrated medical capability to the company. On my rotation this was supplemented by all company members undergoing mandatory first aid training with an emphasis on treating battle casualties.

In peacetime training of the time the only mandated requirement for combat medics was that one had to be present at any range practice involving high explosive; that is range practices involving grenades or anti-armour weapons. There was no mandated peacetime requirement for medics to be deployed with companies although in practice one would normally accompany a company exercise being held in an area remote from medical support.[358]

Prior to departing Australia we had to be at DP1, with no medical or fitness issues, and to a high standard of training ready for operational deployment. As part of that we underwent refresher training in combat first aid. Due to our pre-deployment briefings it was clear that we could be facing a real need for the refresher training. This was reinforced by the Vietnam vets amongst us who went through the same prior to departure to Vietnam, and by other diggers who had been on exercise overseas in

[357] Submission 70, Mr Christopher Brettingham-Moore.
[358] Submission number withheld, Private.

other allied countries yet had never had to undergo the same refresher training or fitness scrutiny prior to departure.[359]

My primary task was as a stretcher bearer/first aider attached to one of the platoons and I also had two other band stretcher bearer Privates in my charge who were allocated to two other platoons. During day time routine I was to remain in the vicinity of the company HQ, with a first aid kit, in case of a QRF call out which I was to join.[360]

We had endured a lengthy pre-deployment training period whilst still at Lavarack barracks, that included bayonet fighting, combat first aid lessons, navigation, intense physical fitness training and section and platoon formations and counter-enemy drills. In Malaysia, our readiness tempo had markedly increased from my service in Australia to include advanced first aid training, jungle navigation, living in the jungle, section drills, the use of non-section weapons, such as the Carl Gustav anti-armour weapon and section live fire attacks, which I had never experienced in Australia.[361]

We were briefed on the expectation that casualties may occur. We practiced casualty evacuation drills and were trained on how to treat a casualty with saline bags. This had not occurred in Australia.[362]

Because of the use of live ammunition and the likelihood of conflict, there was an expectation of casualties. All members of the company had to carry a field dressing and it had to be in good order at all times. A "field dressing" is a first aid kit primarily for the treatment of gunshot wounds in a first aid setting.[363]

Taped to the butt of our rifles we had a large bandage each, that had a big absorbent pad. We where (sic) briefed on how to use them, which wasn't needed as they could only be used one way, but if shot put the pad over the wound, then wrap the wound as tightly as possible, and if bleeding doesn't stop, then hold bandage down tighter with your hand;[364]

18.48. In the Tribunal's view, the above arrangements were as consistent with 'non-warlike' service, where there was a *possibility* of casualties, as with 'warlike' service where the likelihood of casualties was high enough to raise an *expectation*.

[359] Submission 41, Mr Raymond Fulcher.
[360] Submission number withheld, Private.
[361] Submission 31, Dr Craig Ellery.
[362] Submission 27, Major Graham Hayes (Retd).
[363] Submission 63, Mr Peter Kelly.
[364] Submission 19, Mr Trevor Wharton.

Use of lethal force

18.49. A number of submissions, and arguments put at the public hearings, focussed on the assertions that the RCB ROE allowed use of lethal force. There is no doubt that this is correct – although the *shoot to wound and not to kill* provision in most of those ROE did place a qualifier on when the application of force could be taken to that level. But the fact that use of lethal force was authorised did not mean that the ROE were not *limited to self-defence* (as discussed in Chapter 15) and that fact was also consistent with 'non-warlike' service (although not exclusively to the exclusion of 'warlike' service).

Authorised use of force once attacked

18.50. Some submissions suggested, inferentially, that once an attack was mounted against ABB, all limitations in the RCB ROE, including the limitation to within the base perimeter and the *'shoot to wound and not to kill'* provision, ceased to apply and RCB members thereafter were authorised to apply force without limitation. The Tribunal rejected this proposition for which it found no supporting evidence and considered that the RCB ROE remained applicable at all times and were *limited to self-defence*, and thereby consistent with 'non-warlike' service.

Live ammunition – state of weapons readiness

18.51. A high number of submissions drew attention to the fact that RCB members were issued on a daily basis with live ammunition. Clearly, this was consistent with both 'non-warlike' service and 'warlike' service and was in stark contrast to the usual experience of RCB members on 'peacetime' service in Australia.

18.52. But most of these submissions spoke also about the state of weapons readiness while on RCB duty. In this latter regard it was apparent that there was a great deal of difference in practice between various RCB deployments. In some it was clear that live ammunition was in taped magazines; in others it was claimed that magazines were untaped.[365] In some submissions it appeared that weapons were in the 'action' state, meaning that only the safety switch had to be turned off before the weapon was fired;[366] in others it was said that weapons were in the 'loaded' state;[367] in yet others it appeared that live ammunition, while issued, was not loaded until required to be fired.[368]

18.53. While it seemed that practices in regard to weapons readiness may have occasionally violated Unit Standing Orders on some deployments (discussed in some detail at Chapter 15, paragraph 54), in the Tribunal's view the state of weapons readiness was not a distinguishing feature in its own right, although it was clearly central to the ability to apply force – the

[365] Submission 50c, Mr Linton Solomon, Submission 52a, Mr Mark Butler.
[366] Submission 41, Mr Raymond Fulcher, Submission 101, Mr Robert Bak.
[367] Submission 11, Mr John Summers, Submission 17, Mr Paolo Marin.
[368] Submission number withheld, Private.

capability to apply armed force was the key and it was equally required for both 'non-warlike' and 'warlike' service.

Nature of weapons

18.54. Various submissions[369] drew attention to the range of different weapons available on RCB service (such as Carl Gustaf recoilless rifles, mortar launchers and starlight scopes), and noted how that contrasted with weapons issued on 'peacetime' service in Australia. In the Tribunal's view this reflected the need for effective action to respond to and defeat a potential attack on ABB and was equally consistent with self-defence in a 'non-warlike' situation as with proactive action against a hostile force in a 'warlike' situation.

Apprehension

18.55. Many submissions noted that the author had experienced significant apprehension and on occasions fear for their life while on RCB service, particularly on QRF duty. It was noted that RCB members were never advised in advance whether a call out was *for real* or simply as a drill, and that briefings constantly emphasised the risk of a CT attack and the need to be fully alert. Representative comments in this regard included:

> *Every time on QRF or Standing Patrols I constantly felt in danger.*[370]
>
> *I felt in serious danger when patrolling around the airfield boundary particularly during the night alone with only a wire fence protecting me from the Enemy.*[371]
>
> *At no time during a call out of the QRF were you aware if it was a practice run or an actual threat from the CTs. This would give each of us a heightened awareness and on many occasions the thought of this being a real call out was on your mind and the adrenaline would surge through you. It was not until you arrived at the KP where you would conduct dry fire and movement through the KP to secure the area from the threat; that the duty Officer would inform you it was a practice run and whether your performance based on Section tactics or time taken was adequate.*[372]
>
> *I believe there was always a heightened sense of awareness that enemy attacks could happen at any time… the risk of underlying hostile intent was always there.*[373]
>
> *I recall the first time when doing a perimeter patrol, it was night time and prior to commencing the patrol, the other person with me was a Vietnam veteran who advised me to hit the ground immediately if we came under attack. He explained that we had no cover and stood out against the lit up background of the air base. As I looked around towards the middle of the air field I could see an RAAF dog handler*

[369] For example, Submission 68, Mr Liam Shanley.
[370] Submission 28, Mr Christopher Donnelly.
[371] Submission 32, Colonel Gary Cook (Retd).
[372] Submission 43, Mr Neil Page.
[373] Submission 48a, Mr Christoph Berg.

patrolling the air strip with the dog on a lead. He also stood out against the lit up background. Looking back now, it was a reality check for me and despite all of the training, initially I felt very nervous.[374]

18.56. In the Tribunal's view, these very understandable feelings of apprehension would naturally arise in a 'non-warlike' situation where the assigned duty was to react to and defeat an armed attack by way of self-defence, and they would not be consistent only with proactive 'warlike' service.

Security incidents

Incidents on ABB

18.57. There is no corroborated record of any CT attack on ABB during the period 1970 to 1989, although there was always an assessed threat that such could occur. At no stage was the GDOC activated to the Red Alert state, although there were multiple occasions on which it was activated beyond the default Yellow to Amber Alert. Some of these were precautionary in anticipation of possible CT activity on Red Letter Days such as Chinese New Year and immediately following CT attacks elsewhere in Malaysia; others however were in reaction to a more specific perceived likelihood or an observed event. Some security incidents occurred while on RCB duty without the GDOC being activated at all.

18.58. Many of the incidents referred to in submissions were based on hearsay and are thus less reliable than those that involved eye witness accounts.

18.59. Examples of specific events referred to in submissions include the following:

While off duty but still in base ALL Personnel were ORDERED to the Base armory. Told that CTs had entered the air base, weapons were handed out at random. I was given a GPM-M60 along with 500 round of live ammunition, then ordered to load and action the weapon. We then ran to a Key Point on the base and took up a Defensive Position. (Rules of Engagement Where if we don't get the proper responds to our challenge we were to engage with force. I spent the next 5 hours in a drain with an armed section (Composite) waiting to engage an enemy. This was not training or an exercise and there was a real risk of injury. After this incident the Base was locked down for 7 days, and heightened Security measure implemented.[375]

Some terrorist groups did enter the base, or engage with mortar fire, but the cation was detected and repelled.[376]

[374] Submission 74, Mr George Lovett.
[375] Submission 6, Mr Stephen Adams.
[376] Submission 86, Major Keith Fraser.

During my 2nd tour with A Company 1 RAR, on 5 August till 8 August 1975 the entire Rifle Company was stood to, as a result of a heightened CT presence/activity in the Province of Wellesley approximately 33 kms from BAB; along with the discovery of a large hole that had been cut in the perimeter fence of BAB.

The BAB RAAF Commanding Officer ordered the entire Rifle Company to be stood to for the period of 5 to 8 August 1975; and to mount in addition to the 10-man QRF Section 5 x 5 man Standing Patrols and a 10 man Section to mount a roving picquet on the RAAF Mirage flight line. This amounted to 45 members (not including the SNCOs and Officers) on duty each full day during that period. The remainder of the Rifle Company was on standby in the Company lines to be used as additional QRF and relief for the members on duty. Further on each Standing Patrol a Malay Soldier was attached as an interpreter and extra rifle. Each member of the Standing Patrols was armed with individual weapons including GPMG and live ammunition, once again adherence was given to the ROE. The Standing Patrols I was involved in were conducted at the old Chinese cemetery on the Eastern side of BAB airstrip.[377]

We had one situation where we were called out on QRF in the early morning where we encountered an intruder. Warnings were given to the point of firing when it was confirmed via radio that he was a Malaysian guard in wrong place.[378]

On no less than two occasions our section received messages via the radio to deploy to the south perimeter fence with magazines fitted with live ammunition for all weapons including the GPMG60 section machine gun which was under my direct command. We were ordered to advance and investigate activity that had been reported to RAAF command and act accordingly within The Rules of Engagement that were considered potential breaches of the perimeter fence. We found after a search of the area that there was no such breach, however, the sense of a potential contact with the enemy was front of mind. After declaring the area safe, we reported to RAAF command and were ordered to stand down and return to the QRF (guard) room and remain on high alert[379]

... my section was reacted to a report of shots fired at the flight line and did a sweep of the area. This was not the usual quick reaction force drill that was routinely undertaken.[380]

... whilst at Air Base Butterworth we had an incident which sent the base into lockdown and on high alert. A male insurgent let of a mortar and then blew himself up close to our quarters at the southern end of the Air Base.[381]

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[377] Submission 1, Mr Michael Connolly.
[378] Submission 28, Mr Christopher Donnelly.
[379] Submission 23, Mr Wayne Penhall.
[380] Submission number withheld, Private.
[381] Submission 42, Mr James Redgrave.

During my second tour … we had to lay an ambush on the southern side of the Airbase. We had live ammunition with loaded weapons and operational Ambush Orders which are lethal. The ambush was laid due to intelligence briefs handed down to the Commander Rifle Company Butterworth. After several hours lying in wait the ambush was not sprung and we withdrew from the bush site.[382]

That night we were alerted to a possible breach to the base and a figure seen around ammunition bukers (sic), we deployed to the area by truck, after dismounting we were given the order to load, we then broke into formation and searched the area and we encountered a figure near a bunker and was given the engagement in Malay … As I was forward scout and had my sargent (sic) alongside I had sighted a human being for the first time with a loaded weapon, the person turned out to be an airbase guard away from his post going to the toilet[383]

18.60. A small number of submissions did suggest that there may have been some external infiltration onto the Base, but provided insufficient detail to enable corroboration - for example:

Whilst I was serving at RCB jun to september 77, myself and another pte came under fire from outside the fenceline on the boundary of the airbase. This precipitated the erection of a fence behind the barracks to eliminate line of sight for the CTs[384]

Some terrorists groups did enter the base, or engage with mortar fire but the action was detected and repelled[385]

Was there at Rifle Coy Butterworth in Dec 82, we had live ammo and also had insurgents trying get into the Airbase. Groups before us was mortars fired onto the airbase. Also 2 people were shot in Feb 83, trying to get into base.[386]

18.61. In other cases it was not clear if any infiltration that occurred was in fact by CTs – for example.

One night we were called out for real and as the M60 gunner I went to action, one male was detained [387]

On one occasion when my section were called out to a KP we were deployed in extended line on arrival, ordered to the weapon readiness state of 'Action' and commenced to dry fire and move towards the fence line in pursuit of a male that exited through a hole in the perimeter fence.[388]

[382] Submission 101, Mr Robert Bak.
[383] Submission 111, Mr Paul Jordan.
[384] Submission 113, Mr Phillip Brown.
[385] Submission 86, Major Keith Fraser (Retd).
[386] Submission 2, Mr Russell Hill.
[387] Submission 134, Mr Ross Peskett.
[388] Submission 37, Mr Mark Fulcher.

In our time at Butterworth, our company had an encounter, the airbase wire was breached and they were somehow able to elude base patrols, there were two soldiers and they attacked one of soldiers coming from the ablutions, he was confronted and stabbed in the cheek, the soldier staggered into the radio hut, which was occupied and manned by Private Danny Hanly, he could verify this incident if required… After the incident we were instructed to move in pairs when performing any duties from barracks to mess, ablutions, etc … I didn't witness this myself and was informed of the incident the next day, I am not sure if records state the incident [389]

I remember on one distinct occasion it was about 11pm at night. Our section was informed that there had been an incursion of armed persons on a location near some RAAF fighter jets. I remember the orders coming through and we were trucked to a location and ordered to set a defensive perimeter around that area of the base. We were deployed into position and issued with live ammunition and orders were given to challenge any person or vehicle that entered or approached our defensive position. We maintained that defensive position until about 1 hour after daybreak. At this time several more sections from our Battalion arrived and relieved us. [390]

Off-base incidents

18.62. RCB duties were *prima facie* confined to the perimeter of ABB but could be authorised to be performed outside the base. Additionally, RCB personnel, generally at platoon level, travelled to remote MAF firing and similar ranges for training or practice. From these occasions there were some incidents recorded in submissions to the inquiry.

18.63. One such occasion involved RCB members guarding a RAAF Mirage that had crashed some distance from ABB. As noted by one submission:

On another occasion, our whole platoon was called out, fully armed with 20 live rounds in the magazine, times 3 = 60. Heavy weapons where also used, loaded, A RAAF plane had crash landed about 10 Klms short of Butterworth Air Base. We where told we would be staying out until relieved by another platoon, this was going to keep going until every piece of the plane was removed, so the CTs {Communist Terrorists } couldn't use any part in making bombs from them, we where also warned that we would be in danger and could come under attack, whilst guarding. Our ROE was to return fire immediately, if fired upon.Some spent ages waist deep in the paddy fields water, I was on the embankment. Around Dusk time, I noticed that we where being approached by 3 people, one carrying a torch. My CPL signalled myself and my "mate", fellow digger, to challenge them.

[389] Submission 24, Mr Martin Sanders.
[390] Submission number withheld, Private.

Calling out BERENTI 3 TIMES , they acknowledged, by stopping immediately, we signalled by hand, for them to come to us, the whole time keeping our weapons trained on them, expecting anytime to be met with a firing force. It turned out 3 men were fishing, one holding bucket, one a Dolphin type torch, and the other using a Machete to cut the heads off the fish while swimming in the paddy field, made us feel quite uneasy to see how good they where (sic) with the weapon. We where (sic) also reminded by our OC that the quicker it was cleared up the less chance of being attacked from the CTs.[391]

18.64. Another submission of relevance to the Mirage crash stated:

On the 1st April 1974 our platoon was the designated platoon for the QRF, and we were called out to guard the wreckage and surrounds of a crashed Australian Mirage fighter jet that crashed several kilometres from the airbase.

An Australian Mirage (A3-18) crashed as it approached the air base several kilometres outside of the airbase.

We were immediately activated and transported to the crash site. We were armed with our section weapons and webbing, and live ammunition was available in the QRF vehicle.

One section guarded the road and controlled the movement of civilians, one section camped next to the wreckage and the third section took up defensive positions on the beach.

The section I was in was assigned to guard the road and our role was to keep inquisitive civilians back from the site and controlled those who needed to use the road.

I saw the wreckage firsthand. I noticed that the rear section of the plane was intact but there were three holes in a straight line. To me they looked like bullet holes. I called over my section commander, Corporal Lenny Allen, and he expressed his view that they were bullet holes and he said that we had to 'switch on', which was a euphemism of the day signifying that this was a real security threat caused by the CT's and that we had to be on full alert.

The next day a patrol of armed Malaysians came through the crash site and one of them approached us for food. I was one of the soldiers he approached. We asked him what he was doing there, and he told us that his battalion was called out to 'find the CT's that had shot the plane down', to quote his exact words.

We were there for a couple of days and during that time an Iroquois landed with some highranking army officers on board. I saw the red on their lapels, so I decided to

[391] Submission 19, Mr Trevor Wharton.

make myself scarce, a common practice for privates. I've often wondered why high-ranking army officers would be concerned with a crashed air force mirage. In the last few years, I was able to locate the findings of the Board of Enquiry held at Butterworth that investigated the crash of A3-18.

The Board of Enquiry found:

> *It is most probable that the first event in the sequence which culminated in the destruction of*
> *A3-18 was the separation of a portion of one of the front row compressor blades. Whether the blade broke as a result of impact with a foreign object, or as a consequence of a pre-existing deficiency will be the subject of further analysis by authorities in Australia. The separated piece of blade seems to have caused massive compressor damage. The engine was then no longer capable of producing sufficient thrust to sustain flight and the crash becomes inevitable.*

The enquiry was not able to determine if the rotor blade broke due to an internal fault or whether a foreign object caused the failure. The report recommended that further analysis be conducted in Australia.

The pilot testified that he had not gone lower than 8000 feet and that the fault occurred as he was pulling out of his dive. He had not fired his weapons. He was also questioned as to the planes reaction if a foreign object had entered the engine.

Attached with this submission are two photos that show holes in the rear section of A3-18 that I believe are bullet holes.

A possible explanation was offered by some former RAAF members who hypothesised that the holes were inspection holes that had been filled with solder, and when the planed burnt the solder melted. That sounds a reasonable explanation except for the fact that a part of the planes serial number and other markings are still visible, so the rear section did not burn.

I have searched for the Australian enquiry into the crash of A3-18, but I have been unable to locate it. Until I see evidence to the contrary, I am of the belief that A3-18 was bought down by hostile enemy fire.

I have reached this conclusion by my own observations and from orders from my section commander, a distinguished Vietnam veteran, and Malaysian soldiers at the site that CT's were responsible for the crash, and that our subsequent actions were dictated by the objective danger we faced.[392]

[392] Submission 48, Mr Christoph Berg.

18.65. The Tribunal noted the view that Mirage A3-18 had been brought down by hostile enemy fire. However, the Tribunal also noted that there was no suggestion anywhere in the Court of Inquiry Report that the loss of A3-18 was anything other than a purely technical malfunction. Critically, the Court of Inquiry would have reached the conclusion that hostile action was not part of the causal chain after considering all of the available evidence, including such observations as the asserted 'bullet holes' in the wings and fin. Given the timing of this crash (April 1974, as CT activities were starting to escalate), the Tribunal was of the view that it is reasonable to assume that any sense of CT involvement, even peripheral, would almost certainly have been documented in the report.

18.66. The Tribunal noted that the Court of Inquiry identified just two probable failure mechanisms, these being impact with a foreign object,[393] and a pre-existing deficiency. The actual failure mechanism was meant to have been determined following *further analysis by authorities in Australia.* [394] No record of any such analysis was located.

18.67. In any case, the Tribunal took the view that hostile enemy fire would likely have been removed from further Court of Inquiry consideration on the basis of the following:

a. There was no evidence before the Court of any projectile damage to the engine casing. Regardless, had hostile fire struck the engine from below on departure from Butterworth,[395] it is highly unlikely that a gas turbine engine would have continued to operate without failure indications for the time taken to transit the 20 nautical miles to Song Song Weapons Range, and to fly the first pass. It is even more unlikely that a round could have been 'ingested' into the engine intake, in such a way as to cause the damage to the compressor blade that was assessed to be the primary cause of the engine malfunction which resulted in the crash.[396]

b. It is also highly unlikely, although possible, that small arms rounds could have disabled a critical system, assuming that the aircraft was hit on departure. However, had enemy fire actually disabled a critical system, such as the fuel or hydraulic system, a vastly different and self-evident failure mechanism would have been produced.

c. Further, the size of the holes in the wings were not consistent with the calibre of any weapon available to the CT.[397] These holes appeared to be at least 50mm

[393] Foreign Object Damage (FOD) is normally caused by the ingestion, whilst on the ground and typically at moderate to high power settings, of foreign objects such as a nut or bolt. The damage to the compressor blades would normally produce excessive vibration, particularly at the high power settings required on departure and in the climb.
[394] NAA: E1079, R3: *'Proceedings of a Court of Inquiry - Report on Accident to Mirage Aircraft A3-18 – Air Base Butterworth'*, p69, Document number 81.
[395] The only time that the aircraft could have been hit with the weapons available to the CTs was early in the departure. This is because the aircraft was operating at altitude on transit, and on the range, the patterns for which are almost entirely over water. Apart from the departure, the aircraft was consistently well above the vertical effective range of small arms, these being the only weapons available to the CT at the time. (*The Security of Air Base Butterworth,* JIO, October 1975. Submission 79, Mr Stanley Hannaford, paragraph 29.)
[396] NAA: E1079, R3: *'Proceedings of a Court of Inquiry - Report on Accident to Mirage Aircraft A3-18 – Air Base Butterworth'*, p20. Document number 81.
[397] Photos of 'bullet holes' are at Figure 2/Page 9 of Submission 49, Mr Leslie Ray.

(possibly more) in diameter, far larger than could even have been caused by small arms fire.

d. Notwithstanding the speculation that these were bullet holes, the Tribunal was confident that the Court of Inquiry would have known exactly what they were, and appreciated the implications of their presence.

18.68. Another submission referred to another RAAF aircraft which crashed into the ocean killing the pilot. In this case it appears that there was no suggestion that the aircraft had been brought down by CT activity. Rather, RCB personnel were directed to guard the crash site to prevent CTs or pirates salvaging anything from the aircraft that could be offered for sale back to the Australian government. That submitter related that:

> *We were tasked with protecting the crash site staying on the water overnight (teams of three) on what was referred to as Big Boat One. ... We were deployed on the second or third night. We had been told that on a prior night, the team had opened fire on boats that would not heed warnings to stay away. On the night we were deployed ... we were taken to Big Boat One over the horizon by a smaller speed boat. Here is the kicker, we were told weapons would be on Big Boat One. They were not, however our orders remained the same and told to improvise if needed. During the night (pitch black) we could here boats chugging in the distance and more than one. A boat came into view and was obviously dredging. We had on board a Ferry Pistol and limited rounds. We as a group decided to send up a flare as a warning and hopefully a deterrent. We did so. The Boat appeared to back away. But within a short time returned. At this time [we] fired another flare near the boat. The boat continued. So [we] fired another flare at the boat. This caused the boat to withdraw. The rest of the night we remained alert and did not sleep until relieved the next morning.*[398]

18.69. Other off-base incidents included the following:

> *My experience was off the base and during operational patrol training in Paladar (sic), I was part of a recon group and during that time I encountered what I believe was a communist insurgent. I believe this to be true as he was carrying a side arm (a colt 45) which was holstered. I looked at him he looked at me, and we did surprise each other, he smiled (had a big grin wearing Straw Hat) I waved/gestured to him he then disappeared back into the Jungle. There was no other reason for a person to be there except us. He was doing what we were doing, except I totally believe he was monitoring operations/tactics.*[399]

> *During this tour, we undertook training at the Jungle Training Wing at Pulada, in Kota Tingi Johor Baru. This was done at platoon level only, as the RAAF Base Commander would not allow more than one Platoon to be absent at a time due to the*

[398] Submission 147, Mr David Kilbride.
[399] Submission 17 Mr Paolo Marin.

threat level. We travelled by road convoy from RAAF Base Butterworth to Palada, in Johor Baru. Prior to travelling our trucks were prepared for enemy attack either ambush or roadside bomb (today known as an improvised explosive device, IED). This included sandbagging the floor of the vehicle, setting up central seating and allocating a body-guard duty for the driver. We undertook counter ambush drills from the configured trucks prior to departure. We were again provided with live ammunition that was loaded into magazines that were then placed in ammunition boxes on the floor of the truck. Our weapons were also laid at our feet (so as not to alarm citizens as we passed through towns). Our orders included briefing on areas that had previously been listed as black spots and could be considered to be more likely to have active communist cadres.[400]

In another situation, my platoon was returning in three trucks from the firing range at Gurun (located in a "black area") where we had expended over a thousand rounds per man of old ammunition, plus thrown a number of hand grenades. The term "black area" relates to an identified area where the CTs were active, requiring a high level of alertness. On the journey back to RAAF Butterworth, we unwittingly drove through the killing ground of a CT ambush. A few minutes behind us was three RMAF trucks carrying Malay troops. The CTs activated the ambush on the Malay vehicles, resulting in a substantial number of casualties.[401]

During my deployment to Butterworth I recall that on one occasion shortly before my platoon was required to move by trucks to conduct live-firing at the Guran live firing ranges communist insurgents attacked the barracks of the 6th Malaysian Infantry Brigade at Sungai Petani, killing two Malaysian soldiers. A Malaysian rubber tapper was also killed by the insurgents at a nearby village. As our intended route to the ranges passed through this area, prior to leaving the airbase my platoon conducted counter ambush drills and when we travelled to the ranges all soldiers carried first line ammunition. I had briefed my Company Commander… of the arrangements for our move to the ranges and he reiterated the importance of emphasising to my platoon that our OFOF permitted the use of lethal force in the event we were attacked.[402]

When we travelled to the off base rifle range we passed through Malaysian Army roadblocks. On the one occasion I went to the range in 1975 I was aware of the following incidents:

> *o Whilst we were conducting our range practice, we noticed flashes of light that appeared to emanate from binoculars located at the end of the range. We surmised that this was a possible observation post for an unknown element.*

[400] Submission number withheld, Private.
[401] Submission 63, Mr Peter Kelly.
[402] Submission 67, Lieutenant Colonel Graeme Mickelberg (Retd).

o On the same day while driving through a Malaysian army checkpoint, I observed a covered body, with blood on the road, and an overturned step-through scooter. At the time we discussed this amongst ourselves and assumed that the person had tried to drive through the checkpoint and didn't stop when challenged.
o After we returned to the base, we learnt that the road we travelled along was a planned ambush site. We also learnt that a Malaysian convoy following behind us was the subject of a CT ambush which resulted in heavy casualties that day. At the time we all thought we were lucky we were not ambushed by the CT's and suffer the same fate.[403]

Incidents involving Malaysian security personnel

18.70. Some contemporary documents suggested that there was some risk to ADF personnel at ABB from Malaysian security forces that might actively engage their weapons before ascertaining that their perceived targets were Australian troops. For example, one of the End of Tour Reports highlighted the potential for 'Green on Blue' (aka 'friendly fire') incidents:

...No incidents occurred, but the very real probability exists for a clash, as Handau troops now man the armed sentry posts on the perimeter, some of which are uncomfortably close to Key Points (KP). As they are without communications, usually with weapons in the action or instant condition and practise different rules of engagement (it) is not hard to imagine the possibility of a clash between one of these posts and an Australian QRF drill reaction to nearby KP.[404]

18.71. Some submissions from RCB veterans reported incidents between RCB members and Malaysian Armed Forces, such as:

While on deployment QRF a MAF vehicle fired on the Aust QRF section I was with. No casualties however all weapons on QRF patrol were brought to the Action condition before situation resolved.[405]

We had one situation where we were called out on QRF in the early morning where we encountered an intruder. Warnings were given to the point of firing when it was confirmed via radio that he was a Malaysian guard in wrong place.[406]

During my deployment the company was put on full notice at least twice that I recall but it was quite common for the Malaysian Air Force police guards which patrolled the outer perimeter to fire their weapons at any potential or perceived danger, in which made very interesting times as the Quick Reaction Force to determine whether the threat was real or perceived, as a rifleman within the guard or QRF we were

[403] Submission 120, Mr Peter Mills.
[404] *End of Tour Report by B COY 1 RAR 9 DEC 81 – 17 FEB 82*, MAJ R. Linwood, p 3.
[405] Submission 6, Mr Stephen Adams.
[406] Submission 28, Mr Christopher Donnelly.

always on contest alert within our area of responsibility of protecting the RAAF assets.[407]

An incident I would like to bring to the Tribunals attention that occurred during my deployment was a "Friendly Fire" unpleasant incident that occurred at BAB. My section, as part of the platoon was conducting a night counterattack on a mock CT incursion near the runway. We were using blank ammunition at the time of the simulated attack. I was in command of the Gun Group within my section and during the fire and movement we came under live fire, the rounds hitting the ground in close enough for me to see the grass and soil thrown up from the impacts of the rounds. I also heard the familiar "crack, thump" that is heard when live round and fired in your direction. I remember 3 rounds that were fired in close proximity to my location. We were immediately ordered to cease fire and to go ground and not move. We laid prone for at least 30 minutes, during this time I assumed that my superiors were sorting out the situation between the Malaysian security forces that maintained the security at the entrance gate to the base. It was from this direction the incoming fire originated. After 30 minutes or so we were ordered to unload our weapons and we were able to return to our barracks.[408]

At one time during a patrol whilst moving from the fuel depot to the flight line I saw a movement in the shadows as there were areas that were poorly lit. Rather than yell berhenti I yelled Halt Who Goes There" twice and from out if the shadows came a Malaysian security guard pointing a machine gun at me. I heard a click (which haunts me to this day) not knowing if the safety was going on as due to the heightened alert the Malaysian guards always had their guns cocked and safety off. A few nights later a RAAF security dog was released from the handler due to a perceived threat. This really unnerved me from that time on.[409]

Tribunal assessment of security incidents

18.72. The Tribunal accepted that all of the substantiated incidents referred to above (and others referred to in submissions not referenced above) reinforced that RCB personnel were deployed to protect ABB in the event of a CT attack and that RCB duties, including those off-base, carried with them a not-insignificant risk that would warrant classification as *hazardous*. However, as none of those that are capable of corroboration appeared to involve direct contact with a hostile force (as opposed to involving the risk of such contact), they all appear to be covered by the phrase *short of warlike operations* used in the 1993 definition of 'non-warlike'. This did not necessarily mean that RCB service could not be classified as 'warlike', but simply that the occurrence of these incidents did not mandate a 'warlike' classification.

[407] Submission 76, Mr James Thorpe.
[408] Submission 123, Mr Brett Heyman.
[409] Submission 133, Mr Gregory Allford.

Joint warlike operations with Malaysian Armed Forces

18.73. A number of submissions, and oral arguments made at hearings, suggested that RCB personnel were engaged in joint military operations with Malaysian Armed Forces who were conducting warlike operations against the CTs and that accordingly RCB personnel were similarly conducting warlike operations.

18.74. One submission[410] referred to a 2 October 1970 Directive from the Department of Air to the Officer Commanding RAAF Butterworth. This Directive was said to have recognised that continuing Malaysian military and police action against the insurgents was essential to the internal security of Malaysia and permitted OC RAAF Butterworth to:

a. provide indirect support from on-base facilities for Malay operations against the CT;

b. continue to be as helpful as possible in providing assistance to the Malaysians, particularly if their resources were taxed in emergency situations;

c. in consultation with the Australian High Commissioner, reach agreement with the MAF on procedures for the transit through Butterworth of Malay forces or the temporary deployment of Malaysian forces to Butterworth in the event of emergency;

d. provide on-base facilities to the Malays without requiring specific approval from any higher HQ to the extent that the provision of the facilities did not prejudice the readiness of Australian forces to perform their primary role; and

e. provide medical assistance on base for Malaysian casualties.

18.75. That submission then noted that:

> *It is apparent from many sources that the Malaysians continued to fly counter insurgency operations out of Butterworth well into the 1980's. What is not so apparent is that for most of these years the RAAF provided the air traffic control, fire and rescue and Base support services at Butterworth, meaning few if any of these Butterworth based missions could have been flown by the RMAF without the support of the RAAF. Presumably this support fell under the 'indirect support' clause of the OC Butterworth 1970 Directive.*

[410] Submission number withheld, Private.

18.76. Other submissions referred to occasions on which the RAAF at ABB had apparently provided assistance to the MAF by providing photographic reconnaissance to assist MAF operations in the Thai border region[411] and to the proposition that the very fact that RCB assumed a major role in ABB security freed up Malaysian forces that would otherwise need to be undertaking that role to pursue off-base operations against the CTs.[412]

18.77. The Tribunal had no doubt that the MAF were indeed conducting warlike operations against the CTs. In the Tribunal's view, however, any provision of incidental services such as air traffic control or photographic reconnaissance did not mean that the RAAF became a participant in those Malaysian operations against the CTs.

18.78. More specifically, RCB/MAF joint operations were limited to the security of ABB, as provided for in the Shared Defence Plan. The Tribunal considered that it was absolutely clear that RCB personnel had no authority to engage in domestic Malaysian affairs beyond responding to a CT attack on ABB if that occurred.

18.79. As a result, the Tribunal considered that RCB service could only be 'warlike' if the duty of responding to such an attack could be properly classified as 'warlike' and that it did not take on that classification by osmosis from the nature of MAF/CT engagement.

18.80. Many submissions also referred to the fact that the MAF were clearly using ABB as a base from which to conduct operations against the CTs. But given that these were MAF operations and that ADF/RCB personnel were not party to the resultant combat, the Tribunal considered that that fact was only relevant to the likelihood that CT forces might attack ABB. As noted in Chapter 14, such an attack was only ever assessed by Australian authorities as 'unlikely'.

Casualties on RCB deployments

18.81. There were no RCB casualties as a result of hostile force action in the whole period 1970 to 1989. Regrettably, however, there were a small number of deaths of RCB personnel from unrelated causes. It was suggested by some that these deaths should be regarded as casualties for the purposes of the 'warlike' definition. However, for the reasons given in Chapter 13, the Tribunal considered that the definition referred only to combat-caused casualties.

[411] Submission 81b, Mr Keran Carsburg.
[412] Submission 90c, Mr Stephen Winthrop.

Malaysian casualties

18.82. Many submissions[413]referred to the numbers of MAF and CT casualties suffered over the period 1970 to 1989 in support of their claim that RCB service was 'warlike'. Submissions also referred to the fact that many MAF casualties were evacuated through ABB and that a small number of MAF wounded were treated at 4 RAAF Hospital.

18.83. The New Zealand Reassessment report provided statistics for CT casualties over the period 1969 to 1989 (212 killed, 150 captured, 117 surrendered – a total of 479) and for the MAF over the same period (155 killed, 854 wounded – a total of 1009).

18.84. These statistics provided a sobering confirmation of the seriousness of the CT insurgency. But, given that RCB service was confined to the limited role of responding to a CT attack on ABB and that the RCB had no role in internal Malaysian affairs, the Tribunal considered that they provided no relevant support for a 'warlike' classification.

CT attacks on other airbases

18.85. A number of submissions referred to the fact that there had been CT attacks on other Malaysian Air Force bases.

18.86. This was a relevant factor in the assessment of the threat to ABB and, as noted in Chapter 14, a CT attack on ABB was only ever assessed by Australian authorities as 'unlikely'. A reasonable conjecture could be that other RMAF bases were attacked while ABB was not because of a concern that attacking a base with Australian personnel could bring Australia into what was essentially a domestic insurgency and make the CT task that much more difficult. But, whatever the reason, the threat to which other bases were subject was not viewed as relevant to assessment of the threat specifically confronting the ADF at ABB.

Defence is a phase of war

18.87. It was argued in a number of submissions[414] and in oral arguments at hearings that defence is a recognised phase of warfare. Submissions and arguments then claimed that the fact that RCB service might have been defensive in nature did not prevent it being 'warlike' and the fact that there was no CT attack on ABB was simply because the RCB had successfully waged that phase of warfare.

18.88. Equally, the Tribunal postulated that it was at least possible that the reason a CT attack did not occur at ABB, in contrast to those that did occur at other RMAF bases, was because of the deterrent effect generated by either the presence of a dedicated and highly trained rifle company (operating in concert with other defensive elements), and/or CTs not wishing to provoke a foreign force and risk that foreign force being drawn into the conflict.

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[413] For example submission 120, Mr Peter Mills.
[414] For example Submission 55, Lieutenant Colonel Ted Chitham MC OAM (Retd); Submission 63c, Mr Peter Kelly; Submission 120, Mr Peter Mills.

18.89. Whatever the situation, the Tribunal considered that, in the context of the 1993 (and similarly the 2018) definitions, the mere fact that a defensive operation has been conducted is not sufficient to render service 'warlike'. In such circumstances it would also be necessary that there be an *expectation of casualties*. That issue is considered in detail later in this chapter.

MAF use of force at ABB

18.90. Many submissions drew attention to the nature of the MAF's use of ABB to wage war against the CTs.

18.91. There is no doubt that RMAF aircraft flew from ABB on missions designed to detect and engage CTs in various parts of the country. There is also no doubt that RMAF aircraft flew into ABB to evacuate MAF casualties from the battlefield. However, those operations were conducted as part of a military campaign in which Australia was not a participant. The Tribunal considered that they were certainly relevant in the assessment of the risk of a CT attack on ABB but the fact that they were conducted from a base at which the ADF was a co-tenant did not mean that RCB service thereby became 'warlike' service.

Tribunal assessment of these features of RCB service

18.92. In the Tribunal's view, analysis of all these features of RCB service, described by RCB veterans and not contested by Defence, led to the conclusion that all were equally consistent with either 'non-warlike' or 'warlike' service and that none provided conclusive proof that RCB service was 'warlike' as contended by RCB veterans and their representative organisations. Indeed, at the Brisbane hearings on 3 and 4 April, representatives of RCB veterans presented no argument that satisfied the Tribunal that there was any uncontested fact of RCB service that was consistent only with a 'warlike' classification.'

18.93. This meant that, if RCB service was to be classified as 'warlike', that could only occur if it was accepted that it gave rise to an *expectation of casualties*.

18.94. As noted in Chapter 13, the Tribunal considered that the term *expectation of casualties* referred exclusively to combat- or mission-related casualties, and did not extend to non-battle casualties. Fatal accidents are a sobering reality of high-risk defence activities and there was, in the Tribunal's view, an inherent assumption in the 1993 'warlike' definition that relevant casualties must be a direct consequence of the military activity for which the application of force has been authorised. The unfortunate non-battle casualties, of which there were a small number over the relevant period of service, were therefore excluded from the Tribunal's consideration of RCB service.

Defence submissions on expectation of casualties

18.95. Defence argued that *there was no record of an expectation of casualties from Rifle Company Butterworth rotations.* It was the case that none of the historical documentation the Tribunal examined recorded a contemporaneous expression of an expectation of casualties. That however did not necessarily mean that there was not (or should not have been) such an expectation. Defence did not substantively address that issue in its engagement with the Tribunal.

Individual submissions on expectation of casualties

18.96. Generally, submissions and arguments from individuals did not address the question of whether or not there was or should have been an expectation of casualties in respect of RCB service. This was because their primary focus was on describing the factual circumstances and features of their service, as discussed above. While there were some general assertions along the lines that *infantry always expect casualties*, the Tribunal considered such arguments to be too simplistic.

18.97. A number of individual submissions did however put some more developed arguments. For example:

a) One submitter contended that *the mere act of putting personnel in harms way creates the expectation of casualties. That is clear even in the more recent definitions of 'warlike'*;[415]

b) Another submitted that a *reasonable person would expect casualties to be incurred during a conflict after considering a number of factors like; historical information, the environment, the nature and state of the conflict, the roles performed, the availability of arms and ammunition, the success or otherwise of Security Forces, the ability of enemy forces to cause casualties, the availability of support for enemy forces etc. I would suggest that the situation we faced in Malaysia met all of these characteristics. The result being that everyone in Malaysia expected further casualties until the conflict came to an end in 1989.*[416]

c) Yet another stated that *for there to be an expectation of casualties' certain conditions need to be established. The proposal that I am putting forward concentrates on the following conditions: a. That there was a threat. b. The threat could reasonably be expected to, and was capable of actions to, inflict casualties. c. The posture of the Rifle Company Butterworth (RCB) was such that they expected to engage in battlefield conditions that may result in casualties. d. That the Butterworth airbase*

[415] Submission 20, Mr Philip Wolfenden; Submission 136, Mr Michael McCluskey.
[416] Submission 25e, Mr Barry Albrighton.

was prepared to handle casualties. I argue that all these conditions have been met.[417]

d) Another submission said that *We all knew that there was the possibility of an armed enemy incursion onto the base. It was accepted by us that such an incursion could result in casualties and that the responding QRF force would be at much higher risk of taking casualties. With this firmly in mind, all QRF call outs were conducted with the aggressive intent drilled into the infantry soldier regardless of the potential consequences.*[418]

e) While a further submitter said *We do not need to go past the reason and the role in which RCB were deployed to Malaysia to understand that there was an expectation of casualties.*

1. RCB was deployed to Butterworth as a Quick Reaction Force to defend our assets and vital points on a Royal Malaysian Air Base during their Communist Insurgency. Our sole purpose at Butterworth was when attacked was to counter-attack, repel, kill, recapture ground, that was RCB sole purpose.

2. RCB role as a QRF was in a constant state of readiness there was never any down time there was never any breaks between deployment a new company would march in on the same day as the old one left. This demonstrates the seriousness of the situation nothing was left to give the CT's any opportunity to attack.

3. RCB was the only combat unit at Butterworth with the task of counter-attack any CT's penetration. Malaysia did not have any troops at Butterworth for this task.

4. The Malaysian Army had casualties on their other bases for doing what RCB was doing at Butterworth, that is to defend our assets and Malaysian vital points on their Royal Malaysian Air Base. Butterworth was a forward operational air base. Malaysian vital points were critical in their war against the CT's, RCB was defending these vital points for Malaysia during their insurgency.

5. It was not just the CT's which posed an assessed threat, but the many subversive groups which acted independently.

6. Under the direction of the Ground Defence Operational Centre RCB was the first responder to an overt penetration which could only result in death and casualties.

7. RCB role was directly intended to engage the CT's on any breach or penetration. This alone gives us the expectation of casualties.

8.The very existence of Communist Terrorist operating around Butterworth with the aim of over throwing the elected government by armed force. Butterworth was a desirable target for the CT's, the CT's were operating on the door steps of Butterworth, bridges and railway lines bombed, military base on Penang Island bombed, CT's were killed 10 miles from Butterworth.

This environment, that is the actions of the CT's, created an expectation of casualties.[419]

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[417] Submission 34a, Mr Stuart Hansford.
[418] Submission 50, Mr Linton Solomon.
[419] Submission 90c, Mr Stephen Winthrop.

f) In a subsequent submission, the same submitter stated that:

The possibility and the expectation of an attack and casualties are the same. There is a possibility I may have an accident driving my car, there is also an expectation I will have an accident driving my car, as I have passed many accidents over the years, and myself have been involved in accidents. I drive my car with the possibility and an expectation of having an accident, as I do not know how the other drivers are going to behave.[420]

g) And in a further submission the same submitter said:

In the 2018 definition it is clear the RCB was authorised to use force, and the expectation of casualties as a result are directly aligned to each other. If we use that authorised force then there is an expectation of casualties. It does not say there has to be an expectation of using that authorised force to be warlike, it does not say we have to use that authorised force to be warlike, just we are authorised to use that force, if there is a need to, and if we use that authorised force then there is an expectation of casualties.[421]

h) Finally, another submitter said:

We also constantly conducted training where there was a casualty theme and we would exercise the practises to extract those casualties whether it be in an urban environment, within the jungle conducting casualty removal from stricken aircraft, securing aircraft due to incidents, there is no doubt in my mind given the repetitive nature of our training being, first aid and medevac drills there was an expectation of casualties and we would be trained to respond to that when required in addition to our hold and secure objective.

18.98. However, the Tribunal considered that none of these contentions were conclusive of the issue and that even more sophisticated analysis was required. This was because the 1993 definitions (and equally the 2018 definitions) clearly required an assessment of the likelihood of an attack capable of generating casualties in order to distinguish between a possibility of casualties to which the 'non-warlike' definition applied and an expectation of casualties to which the 'warlike' definition applies. To be 'warlike' the likelihood of casualties must be greater than a possibility.

18.99. There could be little doubt that if an advanced weapon was detonated at a RAAF base in Australia, casualties would have to be expected. But, unless the risk of such an event was rated as 'probable' or 'highly likely', the Tribunal considered that it could not be said that RAAF duty at such a base would be served under an expectation of casualties. It is only as the likelihood of attack increases that the likelihood of casualties moves up the scale from highly improbable to possible and then, potentially, to a point of expectation.

[420] Submission 90f, Mr Stephen Winthrop.
[421] Submission 90, Mr Stephen Winthrop.

18.100. A number of other submissions also referred to the presence and capability of No. 4 RAAF Hospital Butterworth as meaning that there must have been an expectation of casualties. The hospital was established in 1965, following a decision the previous year to expand the medical services at Butterworth beyond what had been routinely provided by the 'Station Sick Quarters' that had catered to the medical needs of young and generally healthy men. The hospital was principally established to provide medical services to Australian servicemen and their families, and to British Army and RAF personnel remaining in northern Malaya. The capability of the hospital was expanded over time to include specialist services such as obstetrics, paediatrics and surgical capabilities.[422] The hospital had been used to treat serious combat wounds in the early years of the Vietnam War. It clearly had the capability to treat combat-related injuries that might have been generated in the event of a CT attack on the base, and from time to time drills were conducted to test the preparedness for such an event. One submitter advised that Air Vice Marshal Graeme Moller, the Surgeon General of the ADF from 1996 to 1998 and Commanding Officer of 4 RAAF Hospital Butterworth from 1979 to 1980 had authorised the submitter to advise the Tribunal that:

> *No. 4 RAAF was staffed to provide primary treatment to mass casualties, whether these casualties occurred as a result of an attack on the Base or from other causes; Had there been mass casualties on the Base, aeromedical evacuation could have been organised once casualties were stabilised;*
>
> *He was aware there was a Families Evacuation Plan and doesn't believe this plan would have existed had there not been a credible threat to families and the Base; and*
>
> *As Commanding Officer he gave permission for a Malaysian battle casualty to receive treatment for his injury at No. 4 RAAF Hospital but did not routinely treat Malaysian battle casualties. He was aware of Malaysian battle casualties overflying the Base in helicopters on route to Penang General Hospital.*[423]

18.101. In the Tribunal's view, however, the presence and capability of the hospital was equally consistent with a 'non-warlike' or a 'warlike' environment. Once it was accepted that casualties were at least possible, the Tribunal believed it would have been incumbent on the ADF to ensure that it had arrangements in place to cope with them if they eventuated. The Tribunal believed that it would have been unacceptable for the ADF to have held off making sure that 4 RAAF Hospital had the capability to treat casualties until the threat environment progressed to 'warlike'.

Representative organisation submissions on expectation of casualties

18.102. While the organisations representing RCB veterans made numerous generalised assertions that RCB service did give rise to an expectation of service, they made two submissions in particular that sought to develop that argument.

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[422] *Kampong Australia*, Chapter 5 (*No. 4 RAAF Hospital*), pp 156-185.
[423] Submission number withheld, Private.

18.103. The first of these was a document titled *Submission on the Expectation of Casualties.* This claimed to have reviewed Australian intelligence assessments, and other relevant documents, with a view to determining whether the identified threats and the measures taken or proposed to mitigate them were 'indicia of an expectation of casualties.'

18.104. It concluded that *given the capabilities and intentions of the enemy, the assessed vulnerability of Air Base Butterworth (ABB) and the measures proposed or put into place to mitigate those threats, including the tasks allocated to RCB, casualties were clearly anticipated.'*

18.105. The Tribunal had some difficulty with this conclusion, principally on the basis that a number of expert reports cast serious doubt on the CTs intentions to attack Butterworth. That the CTs had the capability to attack Butterworth in some manner was not in dispute - although the Tribunal noted that, in 1975 and at the peak of concern in relation to the security of Butterworth, JIO assessed that there was *no evidence to suggest that* [the CTs] *have either the intention or the ability* to [attack Butterworth]. The CTs ongoing preoccupation with consolidation and recruitment was seen by intelligence experts as being the principle reason why an attack on Butterworth was unlikely.[424] The Tribunal considered the strength of JIO's conviction presumably spoke to its confidence in this assessment.

18.106. The Tribunal also noted the document's use of the phrase that casualties were *clearly anticipated* blurred the distinction that is made in the 'non-warlike' and 'warlike' definitions between what was possible and what was expected.

18.107. The Tribunal considered that key aspects of the RCB Review Group argument were built on selective extracts from various documents that either misrepresented the conclusion of the document, or ran counter to the general thrust of the document. The RCB Review Group appeared to have reconstructed its own conclusions based on selective extracts from authoritative documents and occasionally flawed logic that allowed it to arrive at a vastly different conclusion than the parent document. For example, the *Submission on the Expectation of Casualties* states that *Having said that mortar and rocket attacks were essentially expected and that the use of the booby-traps that had inflicted heavy losses on the Malaysians was a distinct threat, it must follow that Australian casualties were expected*. The Tribunal did not agree with this conclusion for the following reasons:

a. The quote that *an attack…using mortars or other indirect fire weapons…is quite likely* was a comparative assessment made by JIO against other potential methods of attack; notwithstanding this intermediate observation, the JIO report went on to conclude that the likelihood of Butterworth being attacked, regardless of the method of attack, was unlikely.

[424] Per paragraph 14.37c.

b. There were no casualties of any sort in any of the five rocket attacks in March and April 1975; clearly, it did not follow that casualties were a necessary outcome of indirect fire attacks.

c. The intelligence source for the quote that *The CTO has given instructions to its underground organisation in Peninsular Malaysia to carry out rocket attacks against air bases* was unclear. These 'instructions', which were interpreted as meaning that Butterworth and/or Alor Star were 'possible targets', appeared to run counter to JIO assessments of the day and, as far as the Tribunal could determine, no attacks on Alor Star (or Butterworth) were ever reported.

18.108. The second document was principally a risk assessment generated by the RCB Review Group which was then reviewed by the Director of Paladin Risk Management Services, Mr Rod Farrar. Mr Farrar provided what he described as *an expert review of the Risk Assessment of the Likelihood of Casualties prepared by the Rifle Company Butterworth Review Group.* Mr Farrar is a retired Army Officer.

The RCB Review Group's assessment of Likelihood of Attack

18.109. In assessing the likelihood of attack, the RCB Review Group concluded that:

> *The nature and extent of the CT threat to ABB was clearly enunciated in JIO threat assessments that ABB was a potential CT target. This was confirmed by communications from the Australian High Commission at Kuala Lumpur, OC RAAF Base Butterworth, senior Departmental officials and the Chief of the Air Staff and with the Minister. These assessments and communications provide a clear indication that as a result of the regular occurrence of CT attacks at other MAF bases, and at targets in close proximity to ABB, the airbase was a potential target. Further, orders of OC RAAF Base Butterworth to RCB to train for and be on call to respond to attacks and orders for the evacuation and treatment of casualties and the conduct of first aid training for RCB personnel prior to deployment and the allocation of additional medical staff and an ambulance, reflect that the likelihood expectation of casualties is rated at Probable.*[425]

18.110. In the Tribunal's view, the use of the term 'potential target' in the risk assessment narrative was too vague to be meaningful. Whether Butterworth was a potential target or not was of little consequence to this inquiry; what was relevant was whether an attack on Butterworth was so likely that casualties should have been expected as a consequence of its being attacked.

18.111. The Tribunal did not consider that it was reasonable to describe attacks on other RMAF bases as 'regular', given that five attacks occurred over a two-day period, and that for the other almost 7,000 days of the period in question there were an extremely limited number

[425] Submission 65e, RCB Review Group, p40.

of attacks on RMAF bases. And, given that there was no RAAF or RCB presence at those other bases, conclusions drawn from those attacks failed to have regard to the deterrent effect that RAAF and RCB presence at Butterworth may have had on the potential for a CT attack on ABB.

18.112. Nor did the Tribunal accept the proposition that the proximity of CT activity or camps to Butterworth was an indication of an intent to attack Butterworth. There was no doubt that the CT were engaged in an insurgency against the Malaysian government, but there was a significant body of evidence to suggest that the CTs did not ever harbour an intent to attack Butterworth. Perhaps this was because of the profound strategic and tactical implications this decision would generate; it was also possible that no attack was launched against Butterworth because the insurgency did not ever progress beyond the point where an attack on Butterworth would be seen as *premature, and possibly counter-productive*.[426]

18.113. The Tribunal agreed that the nature and extent of the CT threat to ABB was clearly enunciated in JIO threat assessments, which took into account all relevant considerations including adversary capability and intent. The Tribunal's view, though, was that the outcome of the JIO assessments was that attacks on BAB were mostly *unlikely,* and that where the possibility of attack existed, the necessary preconditions for attack were also mostly assessed as *unlikely.*[427] While a limited number of scenarios in both the 1971 and 1975 reports were seen as *possible*, no Australian intelligence agency assessed the likelihood of attack on Butterworth as *probable* at any stage in the period 1970-1989. The Tribunal considered that the assessment of *probable* ran counter to expert Australian assessment.

18.114. Mr Farrar's view on likelihood of attack was based on the assertion that *there was a very real expectation* (emphasis added) *of an attack on ABB.*[428] The contemporaneous evidence discussed in Chapter 14 clearly showed that this basis was not correct.

The RCB Review Group assessment of consequence of an attack

18.115. The RCB Review Group documentation provided a significant amount of detailed assessments and concluded that *Based on the nature of the weapons available, many of which are area weapons, the assessment of casualties as being Catastrophic (I.e. Mass casualties. Multiple fatalities and major injuries resulting in permanent disability) is appropriate.*[429]

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[426] *The Security of Air Base Butterworth,* JIO, Oct 75, paragraph 28, Submission 79, Mr Stanley Hannaford.
[427] See paragraphs 14.16 and 14.42 ***and*** '*Threat to Butterworth'*, JIO, April 1975, prepared for DAFI, paragraphs 7, 10. (Document number 117, p.34) ***and*** *'The Threat to ABB up to the end of 1972'*, ANZUK Intelligence Group, 30 November 1971, paragraphs 45-48, 50 Document 1971130, Submission 66, ***and*** *The Security of Air Base Butterworth,* JIO, October 1975, paragraphs 41-44, Document 19751001, Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).
[428] Submission 65e, RCB Review Group, paragraph 17.
[429] Operational Risk Management assessments are normally generated against five elements these being Mission, Personnel, Capability, Reputation and Environment. Some assessments include a Financial element.

18.116. This view was principally based on the following propositions:

- *Armed attack by the CTs was likely to require the use of force to repel an attack which would result in casualties. Shared Defence Plan included a medical plan.*
- *The CTs were well trained in insurgency tactics, armed and equipped, initially by China and subsequently by the North Vietnamese Army.*
- *There was a possibility of ABB being subject to mortar attack.*
- *RCB QRF could be attacked when deployed to Vital Points in response to a penetration of the perimeter or in response to an attack on the RAAF married quarters,*
- *RCB members could be attacked when off ABB.*
- *CTs made indiscriminate use of mines and booby traps.*
- *There was a possibility of RCB personnel being attacked on route to jungle ranges to the North of Butterworth.*
- *Casualties could arise from various forms of weapons application*
    1. *Direct fire with the capacity to cause multiple casualties.*
    2. *Indirect fire with the capacity to cause multiple casualties.*
    3. *Land mines, booby traps and other explosive devices with the capacity to maim or kill.*
- *Personal Protective Equipment such as body armour was not available to RCB members."*[430]

18.117. The Tribunal took no issue with the RCB assessment that the consequences of a CT attack could have been 'catastrophic', but made the following observations:

a. The extent of adversary provisioning, training and capability carried little weight in the absence of adversary intent.[431]

b. Detailed assessments of the type of injury generated by various weapons types are superfluous against the requirement to differentiate between a *possibility of*

[430] Submission 65e, RCB Review Group, pp41-42. Some of the detail that was available detail has been removed from this summary.

[431] Traditionally, Threat is seen as being the product of Capability and Intent. (Threat = Capability x Intent). Doctrinally, a **threat** possesses deliberate **intent** to inflict harm. (ADFP 5.0.1, Joint Military Appreciation Process, Edition 2 AL3, Canberra, 2019, ANNEX 1C, paragraph 1.) The absence of CTO intent to attack Butterworth is initially and specifically addressed at '*Threat to Butterworth'*, JIO, April 1975, prepared for DAFI, paragraph 4. (Document number 117). *'Although the CTO has, in the past, possessed the capability of attacking the Butterworth Base, even during the Malaysian Emergency, such an attack has never eventuated. There is no evidence to suggest that they have either the intention or the ability to undertake actions of that type.'* Whilst the 1971 and 1975 reports are not as explicit with respect to intent, both assess that the absence of intent is at least in part the consequence of the ongoing imperative to prepare for insurgency and to engage local support (paragraphs 14.19 and 14.41 refer). Further, both reports break out situations in which intent to attack Butterworth might be made evident. These are articulated at paragraphs 14.19 and 14.37.

casualties and an *expectation of casualties*, since all CT weapons systems had the ability to generate casualties.

c. There was no evidence of the RCB ever being *attacked when off ABB* or when *on route to jungle ranges to the north of Butterworth.* While there were a number of documented attacks on Malaysian armed forces in the vicinity of the ranges and occasionally close to Australian forces, in either a temporal or physical sense, the Tribunal considered that this spoke more to the ability of the CTs to accurately identify and target Malaysian forces than it did to any unfulfilled intent to target Australians. Further, the Tribunal considered that the absence of attacks on Australians off-base, including whilst on leave, in concert with the absence of any attack on the base, was consistent with the possibility of a well-executed CT intent to avoid targeting Australians.

d. The statement that weapons systems having *the capacity to cause multiple casualties* should be taken literally. Despite indirect fire's *capacity* for causing injury, there were no casualties reported in any of the five rocket attacks on RMAF facilities in March and April 1975.[432]

Tribunal perspective of RCB Review Group submissions

18.118. Overall, the Tribunal's view was that:

a. the RCB Review Group assessment was inconsistent with the authoritative documents from which selected elements of its argument were drawn;

b. the RCB Review Group had ignored the lack of evidence of CT intent, a necessary precursor to be considered a threat. Threat assessments consistently identified that the CTs, by virtue of their continued efforts to engage the local population and to build requisite levels of support, were *unlikely* to be in a position to attack Butterworth; and

c. the assessment of likelihood, provided as part of the RCB Review Group risk assessment, was much higher than any Australian intelligence agency assessment, and arguably ran counter to the opinion of intelligence experts.

18.119. The RCB Review Group made a further and final submission on the expectation of casualties on 10 July 2023.[433] Attached to this submission was a (heavily redacted) copy of a 13 May 2003 minute by the CDF to the Minister for Defence seeking classification of OP CATALYST as 'warlike' which the Group had obtained under freedom of information

[432] DAFI Security Report No 32, paragraph 1 (Document 19750430), Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).
[433] Submission 65k, RCB Review Group.

legislation. The Review Group noted that the CDF had stated in that minute that *specific threat levels ...* were *...difficult to predict.* The Group then stated that:

> *The brief does not advise the Minister that there was an expectation of casualties of OP CATAYST. Instead, Defence recommended a warlike determination based on current threat assessments [which were "difficult to predict"], the expected ROE [authority to use force], tasks [pursuit of military objectives] and the* ***potential for casualties.***
>
> *We believe that the last, highlighted, point reinforces our argument that the potential risk of harm from hostile forces has been the threshold for warlike service since 1914.*

18.120. The Tribunal regarded the CDF minute to the Minister as establishing nothing other than the fact that the phrase *potential for casualties* had been used rather than the phrase *expectation of casualties* as set out in the then-operative 1993 'warlike' definition. Obviously, it would have been preferable if the CDF had stated expressly whether it had been assessed that there was an *expectation of casualties.* Nevertheless, in the view of the Tribunal it was in no way clear from the minute that the CDF was using a lesser standard than *expectation of casualties*. The minute might equally have been simply less than rigorous in its drafting. But, whatever the case, the Group submission provided no justification for the Tribunal applying other than the strict terms of the still-extant 1993 definition and reaching a view on whether RCB service gave rise to an *expectation of casualties.*

Tribunal assessment of likelihood of casualties

18.121. To determine whether casualties were (or should have been) expected throughout the relevant period, the Tribunal had regard to:

a. the threat environment, using contemporary assessments from relevant agencies and the views at the time of relevant senior Defence and Government personnel throughout the period under consideration;

b. reports from relevant tactical commanders;

c. the extent to which the threat level shaped shared defence arrangements at Butterworth;

d. to the extent that it was available, an assessment of adversary capability and intent; and

e. the views expressed by Defence, RCB veterans and the RCB veterans' representative organisations.

18.122. In determining whether casualties were or should have been *expected* during RCB service at Butterworth, the Tribunal focussed on the extent to which ADF assets, ADF personnel and their dependents at Butterworth (and in the immediate vicinity of Butterworth) were at risk, and did so by determining the likelihood of attack on Butterworth, or surrounds. This is because an attack on ABB was, in an operational sense, the only way that RCB casualties could possibly have been generated.

18.123. No authoritative assessment of the consequence of an attack on Butterworth was ever conducted.[434] Nor did the Tribunal consider that any such assessment was required. In its simplest form, an analysis of the *expectation of casualties* was directly equivalent to the analysis of the *likelihood of a consequence,* where that consequence was *casualties.* It was not necessary to assess the numbers or types of casualties that may have resulted from various scenarios. [435]

18.124. In the Tribunal's judgement, the consequences of any of the methods of attack identified by relevant intelligence agencies were sufficiently similar in their capacity to generate casualties as to be considered identical.[436] On this basis, any *expectation of casualties* must hinge exclusively on the likelihood of an attack on Butterworth.

18.125. It also followed that, in determining whether the requirement that there be an expectation of casualties, a full risk assessment that assessed both likelihood and consequence is not required.

18.126. As detailed in Chapter 14, the likelihood of a CT attack on ABB in most official Australian assessments over the period of RCB service was mostly rated as *unlikely*, although the likelihood of attack was assessed to be *possible* in some defined, limited circumstances. Similarly, the threat level was assessed as *low* in a small number of reports, principally limited to those generated by DAFI. No likelihood assessment or threat ratings from an Australian intelligence agency ever exceeded these ratings. The Tribunal was unable to identify any standard or other lexicon applicable and in use at that time, whether in the general community or more specifically within the Defence and intelligence community, that would give a definitive indication of the meaning intended by those who chose to use those terms in preparing those assessments. Accordingly, the Tribunal concluded that these terms were likely intended to bear their usual meaning in ordinary English usage. The Tribunal considered that, by that measure, those terms were consistent with a likelihood assessment that casualties were possible and did not imply an *expectation* of casualties.

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[434] This is not to say that there were no assessments ever produced, but the ones to which the Tribunal has been able to discover have not been supported by rigorous intellectual analysis, instead been largely based upon supposition.

[435] A Casualty is defined as *'any person who is lost to their organisation by reason of having been declared dead, wounded, diseased, detained, captured or missing.*' Australian Defence Glossary, ID 63872

[436] Especially when considered against other offensive options such as biological, radiological or chemical warfare, all of the JIO identified attack methods.

18.127. The Tribunal additionally considered how those terms might be considered today, when there is far more consensus about generally accepted standards for risk management. In this regard, the Tribunal noted that delineation between the *possibility of casualties* and the *expectation of casualties* is made clear in modern risk management lexicons, where the term 'expectation' is most typically linked to events that are *certain to occur*. In contrast, the term 'possibility' is linked to a *possible* or lower likelihood descriptor commonly used in five-level risk assessment frameworks, as shown in the following table:[437]

Descriptor	Detailed Description
Certain to occur	Expected to occur in most circumstances
Very likely	Will probably occur in most circumstances
Possible	Might occur occasionally
Unlikely	Could happen at some time
Rare	May happen only in exceptional circumstances

18.128. The Tribunal considered that, in applying risk management lexicons, the common interpretation of the term *expectation* could reasonably be extended also to *very likely/probable* outcomes, but not to outcomes with a lower likelihood rating.

18.129. Further, the Tribunal considered that its conclusions could reasonably be based on an assumption that there was a direct relationship between the likelihood of attack and the likelihood of casualties - that is, casualties were unlikely if the likelihood of attack was *unlikely*; casualties are possible if the likelihood of attack was *possible;* and there was an *expectation of casualties* if, the likelihood of attack was either *very likely* or *certain to occur*.

18.130. In light of the above, the Tribunal was driven to conclude that, at no stage between 1970 and 1989, was the likelihood of a CT attack so high as to give rise to an *expectation of casualties*.

18.131. This necessarily led the Tribunal to the conclusion that RCB service was not 'warlike' as defined in the 1993 Cabinet-approved definitions and that RCB service did therefore not meet the necessary criteria for either award of an Australian Active Service Medal or declaration as 'warlike service' under the VEA.

Assessment by reference to the 2018 'warlike' definition

18.132. As it did in the two preceding chapters, the Tribunal also considered RCB service against the 2018 definition of 'warlike'. Given the conclusion that RCB service did not meet the 1993 'warlike' definition, it was particularly important that it should also be considered against the 2018 definition. If the Tribunal concluded that it did meet the 2018 definition notwithstanding its conclusion that it did not meet the 1993 definition, the Tribunal would have considered it incumbent on it to go on to consider whether or not, despite the terms on which

[437] *Code of Practice, How to Manage Work Health and Safety Risks*, NSW Government, August 2019, p 16.

the 2018 definitions were approved by the Minister, they should be given retrospective operation so as to allow conferral on RCB veterans of the medallic and VEA recognition they seek.

18.133. The 2018 definition is as follows:

> *The nature of service (NOS) classification expresses the extent to which ADF personnel deployed on an ADF operation, or on a third country deployment, in a specified area and within a specified timeframe, are exposed to the risk of harm[1] from hostile forces[2] as a consequence of executing the approved mission and tasks.*
>
> ***Warlike***
>
> **Warlike** *service exposes ADF personnel to a direct risk of* **harm** *from* **hostile forces**.
>
> *A warlike operation is an Australian Government authorised military operation where ADF personnel are exposed to the risk of* **harm** *from* **hostile forces** *that have been assessed by Defence as having the capability and an identified intent to directly target ADF personnel. ADF personnel are authorised to use force to pursue specific military objectives and there is an expectation of ADF casualties as a result.* [438]
>
> *1* Harm. *The NOS classification of ADF operational service is based on an assessment of the level of exposure to the risk of harm – both physical and psychological – from hostile forces, but not environmental factors which are recognised elsewhere in the ADF remuneration framework and the conditions of service package.*
>
> *2* Hostile Forces. *Hostile forces comprise military, paramilitary or civilian forces, criminal elements or terrorists, with or without national designation, that have committed a hostile act, exhibited hostile intent, or have been designated hostile by the Australian Government.*
>
> *3* Threat Assessment. *For the purposes of the NOS definitions, the level of threat from hostile forces must be derived from an authorised assessment provided by the Defence Intelligence Organisation or Headquarters Joint Operations Command-J2.*
>
> *4* Terrorism. *A general threat of terrorism which does not specify a direct threat to ADF personnel does not predicate a higher NOS classification than peacetime. To classify an ADF operation as other than peacetime. To classify an ADF operation as other than peacetime based on terrorism, there must be a Defence identifies specific threat to the ADF presence.*

[438] Definitions for Nature of Service Classification: 'Peacetime', 'Non-Warlike' and 'Warlike'. Document number 150.

18.134. In its assessment of RCB service against the 2018 'warlike' definition, Defence advanced a number of arguments summarised below together with the Tribunal's assessment of them:

a) ***Risks of harm from hostile forces associated with Rifle Company Butterworth tasks was* (sic) *assessed as unlikely and low throughout the period.***

This statement was incorrect. The likelihood of attack was, for the most part, assessed as being *unlikely*; however, the likelihood of attack in some scenarios was assessed as *possible*.

Defence failed to address the question of whether or not RCB veterans were exposed to a *direct risk of harm from hostile forces* as required by the 2018 definition. The definition does not contain any adjectival qualifier to require that such a risk must be at a particular level. Noting that DAFI occasionally referred to the threat level at Butterworth as being *low*, Defence was, in the Tribunal's view, required to consider whether the RCB were exposed to a direct, but low, risk of harm from hostile forces.

b) ***There are no reports of any intent to directly target Australian Defence Force personnel on or off duty or the Royal Australian Air Force families resident adjacent Air Base Butterworth or on Penang Island.***

The Tribunal accepted that this was correct and considered that it supported the contemporaneous assessments that an attack on ABB was unlikely.

c) ***The Australian Defence Force, including Rifle Company Butterworth and Royal Australian Air Force aircraft, were not authorised to be involved in internal Malaysian affairs.***

This statement was true in the Tribunal's view but largely irrelevant. RCB veterans were clearly deployed to provide security for Australian assets and interests on, and in the vicinity of, ABB. This operational constraint had no bearing on the 2018 definition.

d) ***There are no records of Australian Defence Force personnel being directly or indirectly involved in any clashes, incidents of events between communist terrorists or in support of Malaysian authorities conducting military operations. … There is no record of the Rifle Company Butterworth security task involving contact with any hostile forces.***

Again, the Tribunal considered these points to be irrelevant in consideration of an assessment of whether or not RCB service involved risk that generated *an*

expectation.

e) Rifle Company Butterworth was not authorised to pursue specific military objectives.

The Tribunal rejected this proposition. The protection of ADF personnel and assets from attack by a hostile force must surely have constituted a specific military objective. There is nothing in the definition that requires that it is limited to proactive rather than reactive engagement.

f) Rifle Company Butterworth was not authorised to conduct offensive operations … Rifle Company Butterworth did not undertake offensive patrols outside the confines of Air Base Butterworth.

Again, the Tribunal considered this to be irrelevant as there was nothing in the definition that required that it was limited to offensive rather than reactive engagement. Further, this statement implied that entirely defensive operations could never form the basis for the award of an Australian Active Service Medal. This clearly could not be correct in the Tribunal's view if such operations generated an *expectation of casualties*.

g) Rifle Company Butterworth Rules of Engagement were defensive … The 1978 Unit Standing Orders for Rifle Company Butterworth reinforced the additional care to be taken with the defensive rules of engagement which directed Rifle Company Butterworth personnel that 'If in doubt, do not shoot".

The Tribunal considered these statements, even if correct, to be essentially irrelevant. The real questions under the definition were whether there was a direct threat of harm from hostile forces, whether there was authority to pursue a military objective, and whether there was an expectation of casualties.

18.135. Accordingly, the Tribunal considered the Defence assessment against the 2018 definition of 'warlike' to be similarly unconvincing and to thereby leave open the question of whether RCB service did meet that definition when viewed in isolation.

18.136. It was notable that the 2018 definition of 'non-warlike' spoke in terms of *an indirect risk of harm* while the above definition refers to *a direct risk of harm*. The explanatory notes in the 2018 definitions provided no guidance as to the difference. Defence did not suggest in its assessment against this definition that RCB personnel were not exposed to a *direct risk of harm***.** Certainly, if CTs did attack the base, RCB members and potentially other ADF groups would have been exposed to a direct risk of harm. Because the 2018 definitions did not make clear the difference between a direct and an indirect risk of harm, the Tribunal was not prepared

to rely on this distinction to claim that RCB service could not be 'warlike' under the 2018 definition.

18.137. Instead, the Tribunal considered the better course was to consider whether the degree of the risk of harm was so great as to lead to an *expectation of casualties*. The assessment of those issues made above in relation to the 1993 definition was equally relevant here and led to a conclusion, for the same reasons, that RCB service was not 'warlike' because there was not an *expectation of casualties* – while casualties were indeed possible if CTs attacked the base, that did not equate to an expectation which required, in the Tribunal's view, a higher likelihood.

18.138. For these reasons the Tribunal considered that RCB service would not be categorised as 'warlike' if the 2018 definitions were applicable.

Overall Tribunal assessment of RCB service against the 'warlike' classification

18.139. In light of the above discussion, the Tribunal concluded that RCB service was not more than 'non-warlike' and could not properly be classified as 'warlike' under either the 1993 definition of that term or, had it been applicable, the 2018 definition.

18.140. This meant that RCB service could not be recognised by either an Australian Active Service Medal or a declaration of 'warlike service' under the VEA.

Correlation of Tribunal assessment with historical consideration

18.141. As detailed in Chapter 7, the classification of RCB service has been the subject of numerous previous assessments, both within and independently of Defence. On no prior occasion has it been concluded that RCB service was 'warlike', and this Tribunal has now come to the same view. However, this does not mean that the Tribunal has simply adopted the analysis and outcomes of those previous reviews and inquiries. As should be evident from the analysis in this and the preceding two chapters, it clearly has not done so. It was therefore appropriate that the Tribunal indicate how its conclusions in this inquiry differed from those previously reached.

18.142. The 1993 CIDA Inquiry concluded that RCB service was neither 'warlike' nor 'non-warlike'. The Tribunal considered that, while RCB service was not 'warlike', it was 'non-warlike'.

18.143. The 2000 Mohr Review concluded that RCB service during FESR was not 'warlike' but that it was 'non-warlike'. While this inquiry arrived at the same conclusion, it was considered by Defence and the Government (and now this Tribunal) that the Mohr Review had applied the wrong test and should have applied the 1993 definition to arrive at the same conclusion.

18.144. The 2003 Clarke Review concluded that RCB service was neither 'warlike' nor 'non-warlike' and did so on the basis that RCB service was simply *normal peacetime garrison duties*. This inquiry has concluded that this fundamentally misrepresented the nature of RCB service and that a proper assessment of that service should result in a 'non-warlike' classification.

18.145. The 2010-2011 Tribunal report did not recommend that RCB service should be reclassified as 'warlike', but it did so on the basis of evidence and analysis far less comprehensive than that considered by the present inquiry.

18.146. Ministerial, Cabinet and Governor-General decisions in the period from 2000 to 2007, supported at the time by Defence, accepted that RCB service was 'non-warlike'. The Tribunal considered that those decisions were correct in substance.

18.147. Minister Billson in 2007 decided that RCB service was not 'warlike'. However, in accepting Defence advice in this regard, he did so on what the Tribunal considered to be a fundamentally flawed basis involving the misapplication of the Repatriation (SOS) Act and misinterpretation of the 1965 Cabinet decision on allotment for special service. Nevertheless, even if the Repatriation (SOS) Act had been applicable, the Tribunal considered that RCB service would not have been properly classified as service in *warlike operations or state of disturbance* to which that Act applied. While the Tribunal has similarly concluded that RCB service was not 'warlike', it has done so for completely different reasons and by reference to the 1993 Cabinet-approved definitions that it considered should have been applied by Defence in providing advice to Minister Billson.

18.148. Minister Billson did decide in 2007, however, that RCB service was 'non-warlike' or the 'hazardous' sub-set of 'non-warlike'. The Tribunal has come to substantially the same conclusion and considered that those decisions by the Minister, on Defence advice, were fully justifiable.

18.149. From 2011 Defence contended that RCB service was not 'non-warlike' as previously agreed but was instead 'peacetime'. It did so without any recorded analysis by reference to the 1993 definitions. The Tribunal has concluded that both the 1993 definitions and the 2018 updated definitions lead to an inevitable conclusion that RCB service could not have been 'peacetime' and that it was at least 'non-warlike'.

18.150. While Ministerial decisions since 2011 have accepted this changed advice from Defence, none have been taken after receipt of any properly informed analysis by Defence by reference to the 1993 definitions.

18.151. Accordingly, while the Tribunal has similarly concluded that RCB service was not ‘warlike’, its analysis in this report makes clear that RCB service was not ‘peacetime’ and that it should be now afforded the enhanced repatriation consideration that was correctly intended and decided upon by Minister Billson but never implemented.

Chapter 19 Other recognition sought by RCB Veterans

19.1. In the preceding Chapters the Tribunal concluded that RCB service was neither 'peacetime' (as contended by Defence) nor 'warlike' (as claimed by RCB veterans and their representative organisations) but was instead 'non-warlike'.

19.2. This means that RCB service has been appropriately recognised by the award of an Australian Service Medal and that it does not qualify for award of an Australian Active Service Medal.

19.3. However, it also means that RCB service does meet the criteria for 'non-warlike service' under the VEA and thus it should be formally and effectively determined as such so that RCB veterans have, as decided and intended by Minister Billson in 2007, the benefit of the more favourable beyond reasonable doubt/reasonable hypothesis test in the assessment of any claims that may make under that Act.

19.4. But the aim of submissions made to the Tribunal went beyond the above claims. In addition, a number of submitters also sought award of the:

a) Pingat Jasa Malaysia;
b) General Service Medal 1962 with Malay Peninsula clasp; and
c) the Returned from Active Service Badge.

19.5. The Pingat Jasa Malaysia is a foreign award rather than an Australian award. It may only be worn by ADF personnel and veterans to recognise service that has been the subject of an offer from the Malaysian Government and where that offer has been accepted by the Australian Government.

19.6. The material available to the Tribunal indicated that during 2004 the Government of Malaysia made an offer to confer a special medal of service to eligible current and former Australian servicemen and women in appreciation of their service in Malaysia with the Commonwealth Far East Strategic Reserve from Independence to the end of Confrontation. The period of service is from 31 August 1957 to 31 December 1966. The Australian Government accepted the offer under those terms.

19.7. RCB service falls outside this period and the Australian Government has no lawful capacity to extend the qualifying period. RCB service thus cannot qualify for award of the Pingat Jasa Malaysia.

19.8. RCB representative groups requested that the Australian Government ask the Malaysian Government to extend the qualifying period to allow RCB service to qualify for the Pingat Jasa Malaysia but, in the Tribunal's view, it would be inappropriate for the Australian Government to do so unless it was of the view that RCB service was on a par with the 'warlike'

service which had been rendered during the period from Independence to the end of Confrontation.

19.9. The General Service Medal 1962 is an Imperial rather than an Australian award. The Royal Warrant creating the medal provides that it *shall be awarded to commemorate such campaign service subsequent to the 23rd day of December, 1962* as may be determined from time to time. The relevant determination for the medal with Malay Peninsula clasp provides that it may be awarded for service only between 17 August 1964 and 12 June 1965.

19.10. RCB service was later than these dates and thus cannot qualify for the General Service Medal 1962 with Malay Peninsula clasp.

19.11. The Returned from Active Service Badge is created and governed by administrative instruments issued by Defence rather than by legislation, which is the case with Defence honours and awards. The relevant instruments provide that the purpose of the Badge is *to recognise Australian Defence Force (ADF) members who have returned from active or warlike service during military campaigns in operational areas*. Active service is 'warlike service' and that it turn is defined as *service by a member in any unit assigned or allotted to a warlike operation*, being an operation *declared to be warlike by the Governor-General*.

19.12. As RCB service has not been declared by the Governor-General to be 'warlike' and in the view of the Tribunal is appropriately classified as 'non-warlike', it is not active or warlike service and thus does not qualify for the Badge.

Chapter 20 Recommendations

20.1. As required by the Terms of Reference issued by the Minister for the conduct of this inquiry, and in exercise of the power conferred on it by section 110W(3) of the Act, the Tribunal's analysis of all the material before it has led it to make the recommendations set out below.

Recommendation 1:

That no further action should be taken with respect to medallic recognition for RCB veterans.

RCB service has received proper medallic recognition by the award of the Australian Service Medal and the Australian Service Medal 1945-1975. For the reasons set out in Chapter 18, it does not meet the eligibility criteria for, and therefore should not now be recognised by, the Australian Active Service Medal nor the Australian Active Service Medal 1945-1975.

Nevertheless, the value of RCB service must be acknowledged. RCB veterans were exposed throughout their service to a risk of attack on Butterworth Air Base by communist terrorists conducting an insurgency against the Malaysian Government. Had such an attack occurred, the consequences could have been severe. RCB service was not peacetime service and its role was not merely training. The proximate cause of RCB service was to enhance the defence of ADF personnel and assets in the event of a CT attack on the Base.

Recommendation 2:

That the 2007 'Billson instruments' should be formally revoked by the Minister in accordance with section 33(3) of the *Acts Interpretation Act 1901*.

Recommendation 3:

That the 'Billson instruments' should be replaced by re-drafted instruments and that once made, these new instruments should be registered as quickly as possible on the Federal Register of Legislation.

Because RCB service clearly meets the definition of 'non-warlike', it should attract the more favourable conditions applicable to such service under the VEA.

Those more favourable conditions were intended to be conferred by Minister Billson in 2007 but failed to be brought into effect by registration on the Federal Register of Legislation, initially because of administrative oversight in Defence and subsequently because of inadequate and wrong analysis within the Department.

While the Billson instruments could now be registered on the Federal Register of Legislation and thereby be allowed to come into effect, it would be preferable that they be formally revoked by the Minister in exercise of the power in section 33(3) of the *Acts Interpretation Act 1901* and replaced by re-drafted instruments. Those instruments should declare the entirety of RCB service to be 'non-warlike' as there is no rational reason why any part of that service should be declared to be the (albeit marginally) less favourable 'hazardous service'. Once made, these new instruments should be registered as quickly as possible on the Federal Register of Legislation.

Recommendation 4:

That no action should be taken to recognise RCB service by the award of either the Pingat Jasa Malaysia, the Returned from Active Service Badge or the General Service Medal 1918-62 with Malay Peninsula clasp.

Recommendation 5:

That consideration should be given to affording the same medallic recognition and veterans' entitlements to RAAF personnel who performed similar duties and were subject to the same or comparable risks as RCB veterans.

RCB veterans argued that RAAF personnel that served at Butterworth should be afforded equal treatment and, in its submissions and at hearing, Defence did not contest that proposition. The Tribunal did not conduct the detailed research that is necessary to confirm that position because its terms of reference were directed exclusively to RCB service. But, on the face of it, the Tribunal saw no compelling reason to withhold that recognition.

Those RAAF personnel should at least include RAAF Airfield Defence Guards, Security Police and any others of relevance.

Recommendation 6:

That extending 'non-warlike' VEA benefits to RCB veterans should not be delayed while consideration of RAAF personnel is conducted.

Recommendation 7:

That the Secretary of the Department of Defence and the CDF should mandate clear channels of coordination between the Nature of Service Directorate and the Directorate of Honours and Awards.

It became increasingly obvious to the Tribunal during the course of this inquiry that the Nature of Service Directorate and the Directorate of Honours and Awards had over a number of years acted in an uncoordinated way and that each had regarded the application of the terms 'warlike' and 'non-warlike' within their areas of responsibility as unrelated to the application of the same terms in the other's area of responsibility. This has led to the frankly absurd position where it has been asserted that the same terms bear different meanings in different contexts, notwithstanding that in 1993 Cabinet clearly approved the then-Minister's submission that they were to be commonly defined, and notwithstanding that there has since been no properly informed Cabinet or ministerial decision to change that common position.

The Nature of Service Directorate reports through the military chain of command. The Directorate of Honours and Awards reports through the civilian departmental chain of authority. This 'silo' structure means that, under present arrangements, coordination can only be effected at the Secretary/CDF level. That is clearly inappropriate – officers of that seniority should not be distracted by what is fundamentally a routine administrative matter. Less senior officers in the respective chains of command and authority should be clearly designated as responsible for ensuring coordinated and consistent application of these basic concepts.

Recommendation 8:

That a fundamental 'root and branch' review of the definitions of the terms 'warlike', 'non-warlike' and 'peacekeeping' should be undertaken to make them each more meaningful and more readily understood.

Recommendation 9:

That, pending the outcome of that review, Defence be instructed that the 1993 definitions be applied for all purposes to all service prior to the Minister's approval of the 2018 definitions, and that the 2018 definitions should be applied for all purposes to all service after that date.

As things stand at present, the 2018 definitions apply to nature of service decisions on terms and conditions (and apparently veterans' entitlements) for all post-2018 deployments, but the 1993 definitions continue to apply for medallic recognition of all pre-2018 and post-2018 deployments. There is no apparent reason as why that should be so. It appears to have arisen only because of the lack of mandated coordination between the two directorates.

But simply applying the 2018 definitions to all post 2018 deployments for all purposes would not be the best outcome. The 1993 definitions clearly evince a graduated scale of likelihood of casualties as service moves from 'peacetime' though 'non-warlike' to 'warlike'. In contrast, the 2018 definitions of 'non-warlike' and 'peacetime' each state that there is 'no expectation of casualties', thus losing the illuminating concept of different likelihood.

Perhaps more fundamentally, none of the definitions contain as much 'granularity' as they might ideally do. For example, the 1993 definition of 'hazardous' simply states that such service involves *a degree of hazard above and beyond that of normal peacetime duty*, without any indication of the magnitude of that degree – should a mere scintilla of difference be sufficient?; should the degree of difference be 'material'?; or, as the NOS papers suggested from time to time, should hazardous duty be *substantially more dangerous than normal peacetime operations*?

The definitions would additionally each benefit from a greater use of definitions to give greater clarity to their meaning and to remove ambiguities such as those highlighted in the Tribunal's analysis in this report.

That the present definitions have allowed Defence and the Tribunal to come to so diametrically opposed views on the application of the 1993 and 2018 definitions of 'peacetime' and 'non-warlike' suggests that all of the 1993 and 2018 definitions require reconsideration to include greater granularity, more consistent terminology, and more use of definitions and guidance notes.

Recommendation 10:

That consideration should be given to adopting the matrix used by New Zealand, or some other matrix, to align threat/risk assessments with medallic recognition.

In conducting this Inquiry, it became clear to the Tribunal that the process employed by the New Zealand Defence Force to determine medallic eligibility provides for a more graduated and granular correlation and that its adoption might be beneficial in the Australian context.

Chapter 21 Acknowledgements

21.1. Completion of this inquiry would not have been possible without the extraordinarily helpful input provided to the Tribunal from multiple sources. The Tribunal therefore wishes to extend its thanks and appreciation to:

a) The 148 individual veterans who provided their own (often multiple) submissions to the Tribunal, – their accounts of their personal service experiences at Butterworth provided an invaluable insight into the reality of that service – an insight that was simply not available from the official files;

b) The office holders of the Rifle Company Butterworth Review Group and the Australian Rifle Company Group Veterans 1970-1989 organisations, and those who were responsible for preparing numerous representative group submissions to the Tribunal and providing detailed input at the public hearings conducted by the Tribunal – in particular, the Tribunal acknowledges:

i. Mr Raymond Fulcher;
ii. Mr Stanley Hannaford;
iii. Lieutenant Colonel Graeme Mickelberg (Retd);
iv. Mr Kenneth Marsh;
v. Mr Peter Kelly; and
vi. Mr Sean Arthur.

The Tribunal also wishes to acknowledge the contribution of Mr Robert Cross, past Chair of the Rifle Company Butterworth Review Group, who was a key and tireless proponent of the claims of RCB veterans for many years from 2006.

While the Tribunal has not agreed with all of the submissions made by these office holders on behalf of the approximately 9,000 RCB veterans whose interests they have sought to advance, RCB veterans should be assured that these individuals have been relentless and dedicated in their efforts and, in the opinion of the Tribunal, no better case could have been made on behalf of RCB veterans.

c) The witnesses who were called by the RCB representative organisations to give evidence at public hearings of their personal experiences in or with RCB service:

i. Lieutenant Colonel Peter Michelson OAM (Retd)– an RCB commander in 1975/76;
ii. Lieutenant Colonel Phillip Charlesworth (Retd) – an RCB platoon commander in 1975/76 and an RCB commander in 1983;
iii. Lieutenant Colonel Russell Linwood ASM (Retd) - an RCB commander in 1981/82;

iv. Group Captain Robert Coopes MBE – an RAAF GDOC officer in 1977/78/79; and

v. Wing Commander Gary Penney (Retd)– an RAAF GDOC officer in 1979/80/81.

d) The officers of the Department of Defence who prepared the Department's submissions to the Tribunal, who researched innumerable archival files in pursuit of answers to questions asked by the Tribunal, and who represented the Department at public hearings. In particular, the Tribunal wishes to gratefully acknowledge the enormous efforts of Mr Ian Heldon, Director Honours and Awards, and Mr Kevin Lawson, Director Nature of Service, neither of whom was provided with any additional resource or relieved of their ordinary and demanding duties notwithstanding that it should have been obvious from the earliest stages of the Committee's inquiry that it would involve extreme in-depth research and analysis of historical events over an extended and now distant period;

e) The officers of the Department of Veterans' Affairs who met with the Tribunal and attended its initial public hearing and whose advice allowed a proper understanding by the Tribunal and the parties of the complexities of the VEA as it might apply to RCB service – in particular the Tribunal acknowledges the expert and ready assistance provided by Dr Jude Van Konkelenberg;

f) Mr Bruce Topperwien, who has extensive experience over many years in the administration of repatriation legislation in multiple capacities and who acted as an additional 'sounding board' to allow the Tribunal to confirm its understanding of the applicable legislation prior to the introduction of the VEA;

g) Professor Dale Stephens of the University Adelaide Law School, who had served as a permanent Naval Legal Officer for over 20 years and is currently a Reserve Legal Officer in the ADF. Professor Stephens had provided advice to the RCB Review Group in 2022 in relation to the ROE issued to the RCB and the classification of 'warlike' service. Professor Stephens was called as a witness by the Tribunal and shared his extensive expertise in relation to ROE at a public hearing; and

h) Honorary Associate Professor David Letts AM CSM, Director of the Military Law Program and Director of the Centre for Military and Security Law at the Australian National University, who reviewed a draft of what became Chapter 15 of this report.

21.2. And, as always, the Tribunal has been superbly supported by its small but dedicated Secretariat, comprising Mrs Sara Miles, Mrs Marilyn Scheidel and Ms Tammy Hayes, all led by the indefatigable Mr Jay Kopplemann. The value and quality of their administrative, organisational, research and analytical input cannot be overstated.

Appendix 1

INDIVIDUALS AND ORGANISATIONS WHO PROVIDED SUBMISSIONS TO THE INQUIRY

Mr Peter ADAMIS

Mr Stephen ADAMS

Mr Barry ALBRIGHTON

Mr Gregory ALLFORD

Dr Martin ANDREW

Mr David ANGELL

Mr Cocivera ANNUNZIATO

Mr Sean ARTHUR

Australian Rifle Company Group Veterans 1970 - 1989

Mr Robert BAK OAM, obo Integrated Servicepeople's Association of Australia

Mr Simon BALTAIS

Mr Noel BARRINGTON

Mr Alan BENNETT

Mr Christoph BERG

Flight Lieutenant Terrence BLAKE (Retd)

Mr Glenn BREEDON

Mr Gary BOYLETT

Mr Christopher BRETTINGHAM-MOORE

Mr Phillip BROWN

Mr Mark BUTLER

Mr Robert CAHILL

Mr Neil CARLISLE

Mr Keran CARSBURG

Lieutenant Colonel Phillip CHARLESWORTH (Retd)

Lieutenant Colonel Edward CHITHAM MC, OAM (Retd)

Mr Michael CONNOLLY

Colonel Garry COOK (Retd)

Group Captain Robert COOPES MBE

Mr Paul COPELAND OAM

Mr Robert CROSS

Mr Christopher CROWTHER MP, Liberal MP for Mornington obo Mr Sabe SAITTA

Mr Iain CRUICKSHANK CSC, DSM

Major John DANAHER (Retd)

Mr Steven DAVIES

Department of DEFENCE

Mr John DENISON

Mr Christopher DONNELLY

Mr Kenneth DUTHIE

Mr Raymond DUTHIE

Mr Jeffrey EARLEY

Mr Colin ELLARD

Dr Craig ELLERY

Mr Leslie FAGAN

Squadron Leader Bernard FARLEY CSM (Retd)

Mr Ken FITZPATRICK

Major Keith FRASER (Retd)

Mr Mark FULCHER

Mr Raymond FULCHER

Major Mark GALLAGHER (Retd)

Mr Charles GALLAGHER

Mr Bradley GEARY

Mr Wayne GENNER

Mr Peter GERDES

Mr Stanley HANNAFORD

Mr Craig HANNAN

Mr Stuart HANSFORD

Major Graham HAYES (Retd)

Mr Darren HENNESSEY

Mr Geoffrey HENRY

Mr Brett HEYMAN

Mr Russell HILL

Mr Derek HOLYOAKE

Lieutenant John HUNT (Retd)

Mr Larry ILIFFE

Mr Kelven JOHANNESEN

Mr Daryl JOHNSON

Mr Garry JONES

Mr Paul JORDAN

Mr Ricky KARAITIANA

Mr Peter KELLY

Mr David KILBRIDE

Mr Marcus LACKMANN

Mr Malcolm LAYT

Lieutenant Colonel Russell LINWOOD ASM (Retd)

Mr George LOVETT

Mr Michael McCLUSKEY

Mr Neville McDOUGALL

Lieutenant Colonel Gary McKAY MC (Retd)

Flight Lieutenant Glenn McLEAN (Retd)

Mr Paolo MARIN

Mr Kenneth MARSH

Mr Ron MARSH

Mr Malvern MASLEN OAM

Mr Derek MASON

Major Mark MATTHEWS (Retd)

Mr Kevin METCALFE

Lieutenant Colonel Peter MICHELSON OAM (Retd)

Lieutenant Colonel Graeme MICKELBERG (Retd)

Mr Peter MILLS

Mr Gregory MINEHAN

Major Arthur MITCHELL-TAYLOR OAM (Retd)

Mr Leslie MORGAN

Mr James MORRISON

Mr Peter MULLINS

Mr David MUNRO

Mr Les NATHAN

Mr Bryan NELSON

Mr John NOLAN

Mr Kevin O'HALLORAN

Mr Ricky O'HAIRE

Mr Neil PAGE

Mr Derek PARSONS

Mr Winston PARRY

Mr Wayne PENHALL

Wing Commander Gary PENNEY (Retd)

Mr Ross PESKETT

Wing Commander Josef PIERS (Retd)

Mr Ian POWER

Mr Robert RASMUSSEN

Mr Leslie RAY

Mr James REDGRAVE

Wing Commander Peter REYNOLDS (Retd)

Rifle Company Butterworth Review Group

Mr Stephen ROBERTS

Mr Geoffrey ROSE

Mr Martin SANDERS

Mr Liam SHANLEY

Mr Lindsay SHAW

Mr Daryl SKENE

Mr Phillip SMAILES

Mr Les SMITH

Mr Linton SOLOMON

Lieutenant Colonel Padre Gary STONE (Retd) obo Veterans Care Association Incorporated

Mr Mark STEWART

Mr Peter STRODS

Mr Philip SULLIVAN

Mr John SUMMERS

Mr Anthony SUTCLIFFE

Mr Raymond THOMAS obo Royal Australian Air Force Dog Handlers Association

Mr James THORPE

Mr Graham TOLL

Mr Michael TROTHE

Mr Ronald TURFBOER

Mr Edmund WASILEWSKI

Mr Neville WARWICK

Mr Trevor WHARTON

Mr Richard WILKES

Mr Jeffrey WINTERBURN

Mr Stephen WINTHROP

Mr Phillip WOLFENDEN

Mr Bradford WOLFF

Mr Christopher YOUNG

In addition, eight individuals lodged private submissions

Appendix 2

TRIBUNAL HEARINGS AND MEETINGS

The Tribunal held third-party meetings and conducted public hearings and heard oral submissions from listed submitters on the following dates:

Tuesday 11 October 2022 Canberra/via videoconference

The Department of Defence

Brigadier Mark Holmes AM MVO
Project Officer, Australian Defence Force Headquarters, Nature of Service Directorate
Dr Paul Robards AM
Acting First Assistant Secretary People Services, Defence People Group

Rifle Company Butterworth Review Group

Mr Raymond Fulcher
Lieutenant Colonel Graeme Mickelberg (Retd)
Mr Kenneth Marsh

Australian Rifle Company Veterans Group 1970-1989

Mr Stanley Hannaford
Mr Peter Kelly
Mr Sean Arthur

Monday 24 October 2023

Meeting with officers of the Department of Veterans Affairs, to discuss 'qualifying service' under the *Veterans' Entitlements Act 1986*.

Mr Brian Eastman, Acting Assistant Secretary, Policy Development Branch
Dr Jude Van Konkelenberg, Director, Liability and Service Eligibility
Mr Stuart Marris, Special Adviser, Legal Services & Audit Branch
Mr Chris Dowling, Policy Officer, Legal Services & Audit Branch

Wednesday 23 November 2022 - Canberra

Department of Defence

Brigadier Mark Holmes AM MVO
Dr Paul Robards AM

Rifle Company Butterworth Review Group

Mr Raymond Fulcher
Lieutenant Colonel Graeme Mickelberg (Retd)
Mr Kenneth Marsh

Australian Rifle Company Veterans Group 1970-1989

Mr Stanley Hannaford
Mr Peter Kelly

Monday 20 February 2023

Meeting with Mr Bruce Topperwien, to discuss operation of repatriation law

Monday 3, and Tuesday 4 April 2023 - Brisbane

Department of Defence

Brigadier Mark Holmes AM MVO
Dr Paul Robards,AM
Colonel Damian Copeland, Defence Legal

Rifle Company Butterworth Review Group

Mr Raymond Fulcher
Lieutenant Colonel Graeme Mickelberg (Retd)
Mr Kenneth Marsh

Australian Rifle Company Veterans Group 1970-1989

Mr Stanley Hannaford
Mr Peter Kelly
Mr Sean Arthur

Individual submissions

Lieutenant Colonel Peter Michelson OAM (Retd)

Lieutenant Colonel Phillip Charlesworth (Retd)

Lieutenant Colonel Russell Linwood ASM (Retd)

Group Captain Robert Coopes MBE (Retd)

Wing Commander Gary Penney (Retd)

Professor Dale Stephens CSM

Appendix 3
RCBRG MATRIX OF ALLEGEDLY COMPARABLE SERVICE

Rifle Company Butterworth Review Group

Principle 3

To maintain the inherent fairness and integrity of the Australian system of honours and awards care must be taken that, in recognising service by some, the comparable service of others is not overlooked or degraded.

Committee of Inquiry into Defence Awards 1993

COMPARISON OF OPERATIONAL SERVICE ENTITLEMENTS AND MEDALLIC AWARDS – RCB (18)

(AS AT 26 AUG 22)

Criteria	Australian Rifle Company Butterworth (1)	Diego Garcia RAAF ground personnel (9)	Ubon RAAF Airfield Defence Guard (2)	Namibia Engineer UN deployment	Somalia HMAS Tobruk and Jervis Bay	Middle East - (incl Iraq) Operations OKRA, HIGHROAD, MANITOU, ACCORDION (4)	Cambodia UN deployment	Rwanda UN deployment (8)
Operational deployment period	2 Nov 1970 – 2 Dec 89	2001 - 2002	1965 - 1968	18 Feb 89 to 10 Apr 90	1992-3	1 Jul 14 ongoing	20 Oct 91-7 Oct 93	Aug 94 to Aug 95
Current award	ASM 45-75 or ASM	AASM	AASM 45-75	AASM and UNTAG medal	AASM	AOSM (5)	AASM and UNAMIC/UNTAC medal	AASM and UNAMIR medal
Initial award	ASM 45-75 or ASM	ASM	ASM 45-75	ASM and UNTAG medal	ASM	AOSM	ASM and UNAMIC/UNTAC medal	ASM and UNAMIR medal
Intelligence Threat Assessment	Yes	Remote possibility from a ground perspective	Yes	Yes	Yes	Yes	Yes	Yes
Closest distance from known enemy	Outside perimeter. No attack	1680 km, across an ocean. No attack	No enemy attacked while AS Air Defence Guards (ADG) were there (2)	Outside perimeter	At sea, docked at Mogadishu on occasions (2). No attack	Outside base perimeter. No attack yet. Many personnel are nowhere near	Mixed with potential hostiles	Outside perimeter, very close at Kibehu, taunting the AS soldiers to open fire

						an enemy, being based in allied countries		
Rules of Engagement	Self-defence, shoot to wound if possible, per ROE	None known for small arms. Very low level enemy air or naval threat	Aircraft provide use of force against aircraft attacking base **(7)**	UN had no ROE so AS troops used ROE/OFOF for self-defence	Self defence, shoot to kill if necessary	OPSEC, but HAS to be at least self-defence, being an operational deployment	Self-defence, shoot to wound if possible, per ROE	Self defence – no shooting engagements unless on order
Patrol area	RCB patrolled inside perimeter, in conjunction with RAAF Police Dog Teams; permission could be given by RAAF Base Cmder to patrol outside	No patrols known	ADGs could patrol outside perimeter **(7)**	Only check points, assembly areas and protection of work locations	Large ocean area plus alongside at Mogadishu	Only inside training area, not outside allied security perimeter	Check points, assembly areas and protection of work locations	Convoy and VP protection. Carried 40mm illum, F89 light machine guns and pers wns
RAAF and RAN Aircraft	Fighters were the prime IADS asset; tasked to stay out of Thai airspace unless cleared. Maintained flight in Singapore. Aircraft conducted patrols over Indian Ocean.	Provide air defence of Diego Garcia base and transiting through it	Limited to Thai airspace providing air defense for the USAF attack aircraft and bombers **(7)**	No. One RAAF officer on ground duties.	N/A. Ships self-protect and achieve mutual protection with other warships	RAAF acft conducting strike missions, EW, refueling and logistic support	6 Army helos in support (armed?) Helos had an armed protection/QR F platoon in base loc	No combat acft. Med pers only
Expectation of casualties	Possible, and planned for.	No. Base medical	Possible. Base USAF and Thai	Possible, including	Possible. HMAS Tobruk	Possible, and planned for.	Possible. Prime role was	Possible. Prime role was to prov

	Combat medics in RCB, with backup from RAAF & local hospitals. 3 Fatal NBCAS.	facilities available. Nil fatal	medical facilities available. Nil fatal	mines. Nil fatal	had an embarked medical team with surgical capability. Nil fatal	Entire deployable fd hosp is deployed in loc with strategic medevac as for MEAO. Nil fatal	to prov comms spt for UN troops. Nil fatal	med spt for UN troops. Nil fatal
Weapons issued	Full complement of rifle company weapons	Normal small arms for air crew	Small arms (rifle and pistols)	Personal small arms only – pistol, SLR and 7.62mm Bren LMG	Pistols, shotguns, rifles and 50cal machine guns	Multiple by both AS and Iraqi Army (Brigade level weapons), including anti-armour	Pers wpns. Inf coy carried rfl and F89 light machine guns.	Pers wpns. Inf coy carried rfl and F89 light machine guns. Thee M113A1s.
Ammunition	Live ammunition all weapons (**1)**	Gnd staff believed to be unarmed (TBC).	Live (small arms only)	Live (small arms only)	Live per above	Live per above	Live per above	Live. Nil explosive
Within range of enemy weapons	Yes – mortars, small arms & explosives	No	No evidence of any attacks involving Australians **(7)**	South African Defence Force (who were not "enemy", intimidated AS troops by firing near them, holing vehicles deliberately at least once	Possibly. Pirates carried RPGs, small arms and up to 12.7.mm DshK	Yes – mortars, small arms, MG up to 12.7 mm DshK & explosives	Yes – mortars, mines, small arms & explosives	Yes – mortars, small arms, RPG/SPG 9, MGs to 12.7mm DshK and machetes
Reinforcements considered	Yes, to battalion strength **(6)**	No	No (Ubon had Thai and USAF defences incl MG bunkers)	No. Part of a UN force that included civilians	Yes	Yes. Operation OCRA is a substantial deployment	Yes. Part of a larger UN force.	Other UN elements
Combat engagements	Yes, by Malaysian army and police. Some green on blue	No	No evidence of any involving RAAF **(7)**	No. "Not a shot fired".	No	Not yet	None known	Kibehu came close. AS fired no shots and were not fired upon (no AS troops hit)
Casualties known after deployment	Nil from enemy, but at three Fatal	Nil	No evidence of any. NVA sappers attacked in 1970	None	Nil	None yet	Some NBCas. Nil killed.	Nil Battle Cas

	NBCAS and many injured NBCAS		after AS left					
Allied casualties within 50 kilometers	Yes (3)	Nil	No evidence of any	Possibly other UN troops	No	Yes – Iraqi Army fighting ISIL	Probable, UN casualties, if any, not known	Large numbers of neutrals murdered
Allied casualties within 100 kilometers	Yes (3)	Nil	No evidence of any	Possibly other UN troops	No	Yes – Iraqi Army fighting ISIL	Probable, UN casualties if any, not known	Large numbers of neutrals murdered
Enemy casualties within 50 kilometers	Yes (3)	Nil	No evidence of any	Not yet identified	No	Yes	Probable, depending on definition of "enemy"	Probably, but not caused by AS troops
Enemy casualties within 100 kilometers	Yes (3)	Nil	No evidence of any	Not yet identified	No	Yes	Probable, depending on definition of "enemy"	Probably, but not caused by AS troops
WILL completed before deployment	Yes	Has to be – they were deployed on overseas service	Has to be – they were deployed on overseas service	Standard UN deployment procedure	Yes	Yes	Yes	Yes
Primary task	Protect RAAF aircraft, other assets and personnel inside the perimeter, and apply service protected evacuations from Penang.	Protect RAAF aircraft, other assets and personnel inside the perimeter.	Protect RAAF aircraft, other assets and personnel inside the perimeter.	Supervise the return of refugees, holding of a general election, withdrawal of South African forces and Namibia's transition to independence	Provide logistic (incl healthcare) support to Coalition forces. Nil refugees treated.	Train Iraqi 206 Corps; self-protect	Provide comms spt to UNAMIC/UNTAC	Med elm to provide med spt to UN force. Rifle company with sect of APCs to protect the med force
Allied support	RAAF Police Dog Teams inside the wire, RMAF (Handau) on the	TBA; probably USAF	Substantial Thai and USAF forces	Part of a UN force incl police and civilians	Coalition naval forces; coalition ground forces when alongside	Coalition forces	Rest of UNAMIC/UNTAC (22,000 troops in all)	UNAMIR I and II.

	perimeter, external defence provided by 6 RMAF brigade (army)							
Basis for upgrade of award	See Note 10	See Note 11	See Note 12	See Note 13	See Note 14	See Note 15	See Note 16	See Note 17

NOTES:

1. For RCB, pistols, rifles, automatic rifles, machine guns, sniper rifles, 40mm grenade launchers, 66mm Light anti-tank weapons, 84mm medium anti-tank guns, all with at least a First Line of live ammunition. Hand grenades and Claymore mines included in ammunition stocks stored inside the base. All available at short notice from on-base ammo storage. QRF carried pistols, rifles, automatic rifles and machine guns, ammunition for which was in the QRF area under guard, and frequently carried on both drill and actual callouts inside the base, and carried on order outside the base on some exercises. MGs were also pintle-mounted on RAAF trucks which had spotlight each for many rotations. Dates are the official Communist Insurgency/Second Malaysian Emergency dates listed by the Malaysian Government.

2. In Ubon, the enemy was in another country – Vietnam, a long way away; the Ubon airbase was surrounded by friendly/neutral Thais. There were no identified local enemy and there is no evidence of any ground contacts while RAAF were there. At the **same time** Ubon was garrisoned with ADG, so too was Butterworth, also a support base for Vietnam). In Somalia, RAN operations ranged from being tied up alongside Mogadishu providing logistic/medical support, to patrolling at sea out to 1000+ km off-shore. There was no enemy navy or air threat. Pirates were a low possibility, being the equivalent to land-based criminals that Army was tasked to defend themselves and the Somali population against. Navy had no contacts. Army had only a few contacts, with nil friendly battle casualties.

3. An array of researched Malaysian publications list MAF casualties. See Document Database.

4. Operation OKRA also features a security force based on a rifle company with virtually identical tasks as those carried out by RCB at Butterworth. A similar protective force, called Force Protection Element, is doing the same in Afghanistan at Kabul. Two **other** separate groups are also in the Middle East – including the Air Task Group supporting the RAAF airstrikes and refueling operations based in UAE/Dubai/Qatar, and the second is the SOTG also conducting "training" in unspecified locations. Such service and others in Operation ACCORDION (some support personnel in the Middle East are not even armed) in support of operations in Iraq and Afghanistan attracted/s campaign medals without ever stepping foot in hostile areas or facing any threat different form that by the RCB 1970-89. For example see https://www.defence.gov.au/Operations/OpAccordion/ where the duties of some of these groups is essentially the same as RCB, and https://defence.gov.au/Medals/Australian/Since-1975/AOSM-Greater-Middle-East-Operation.asp . These award decisions are examples of the ***Statement of Principles No 3***:
To maintain the inherent fairness and integrity of the Australian system of honours and awards care must be taken that, in recognising service by some, the comparable service of others is not overlooked or degraded."

5. The Australian Operational Service Medal (OSM) replaced the AASM. The award criteria for the OSM is at: http://www.defence.gov.au/Medals/_Master/docs/Australian/Since-75/AOSM-GMEO-Instrument-2015.pdf and advised at DEFGRAM 188/2015.

6. RCB Research database Document 19751007 paras 5-6 gives evidence.

7. INQUIRY INTO UNRESOLVED RECOGNITION ISSUES FOR ROYAL AUSTRALIAN AIR FORCE PERSONNEL WHO SERVED AT UBON BETWEEN 1965 AND 1968. 18th February 2011. Item 60. The question then remains as to whether or not this was 'warlike' or 'non-warlike'. Did the squadron face an objective danger? Did they 'incur' danger? Even though no danger eventuated in the sense that there were no actual combat engagements, they were armed for combat and had been told by those who knew more of the situation that danger did exist and they must hold themselves in readiness to meet it, not at some indeterminable time in the future, but at five minutes notice. North Vietnamese sappers attacked after RAAF had left. All RAAF veterans to serve at Ubon were awarded the AASM after upgrade consideration.

8. Medical force protected by 2 and then 2/4 RAR with F88 rifles and F89 LMGs, a section of armoured personnel carriers (armament included 30/50 cal MG combination). Two man crew also had personal weapons.

9. Deployment on 9 Nov 01 of four F18s and air and ground crew from 77 Sqn. Replaced in Feb 02 by same assets from 3 Sqn who RTA Australia 21 May 02. Several scrambles of planes occurred; all false alarms (no enemy). Nil ground threats. "No threat ever materialized" (Defence web site).

10. **RCB.** Still denied recognition of service as 'warlike', despite all of these comparative upgrades/awards. RCB troops served approx. one month for 1 Nov 70-30 Aug 73, then for three months thereafter**.**

11. **Deigo Garcia**. Recognised as Warlike Service per 20011207 - ***Determination of Warlike Service - VEA 86 - OP SLIPPER*** (signed by Danna Vale Minister for DVA for and on behalf of the Minister for Defence on 7 Dec 01). See also http://www.defence.gov.au/Medals/_Master/docs/Australian/Since-75/Australian-Active-Service-Medal-ICAT-Instrument-2015.pdf

12. **Ubon**. **2000 Review of Service Entitlement Anomalies in Respect of SE Asian Service 1955-75**, under chap 6. See http://www.defence.gov.au/Medals/_Master/docs/Reviews-Reports/Review-Service-Anomalies-South-East-Asian.pdf, p73: **Conclusion** … the period of service at Ubon in the period 1965-1968 was warlike in nature. Their service, most certainly comparable with many other groups of all three services in other similar limited conflicts, should
properly be rewarded with the appropriate repatriation and medal entitlements. **Recommendations** It is recommended that RAAF service at Ubon:
… b. in the period 25 Jun 65 until the Squadron was withdrawn on 31 Aug 68 be classified as 'warlike' operational service and that personnel be eligible for the appropriate repatriation and medal entitlements.

13. **Namibia**. 30 days of service with UNTAG from 18 Feb 89 to 10 Apr 1990. See http://www.defence.gov.au/Medals/_Master/docs/Tables/AASM/S303-01-AASM-NAMIBIA.pdf

14. RAN ships off Somalia. ***Inquiry Into Recognition of Australian Defence Force Service in Somalia Between 1992 and 1995***, chaired by Prof Dennis Pearce AO (p7-8): Tribunal found that in the case of both of the RAN Units, their ROE were used to determine the level of their award. In this case, the Ships' ROE were restricted to self defence only (although lethal force was permitted in some circumstances). The Tribunal further found that the use of ROE as the sole criteria for determining the level and classification of honours and awards was flawed. Furthermore, that with the exception of Somalia, medallic recognition principles which began with the lead up to the First Gulf War (1990/91), were based on all assigned ASF units within the AO being treated equally as a part of the ADF Joint Force. The Tribunal found that the recognition for HMA Ships Tobruk and Jervis Bay was inadequate, and recommended upgrade to AASM. Defence opposed this position. See https://defence-honours-tribunal.gov.au/wp-content/uploads/2011/06/Somalia-Report_Public-Release.pdf for full report. One day of service for Naval Component for Operation Solace from 10 Jan 93 to 21 May 93.

15. **Operation OKRA/HIGHROAD.** Not upgraded; participants have been awarded AOSM from the outset.

16. **Cambodia**. 1 day of service (or 1 sortie) with the UNTAC from 20 Oct 91 to 7 Oct 93. See http://www.defence.gov.au/Medals/_Master/docs/Tables/AASM/S102-01-AASM-CAMBODIA.pdf

17. **Rwanda.** 1 day of service with UNAMIR - Operation Tamar from 25 Jul 94 to 8 Mar 96. Recognised as Warlike Service per ***official Media Release by Minister for Veterans' Affairs The Hon Bruce Billson*** *on 13 Feb 06.* 20060213. See also http://www.defence.gov.au/medals/_Master/docs/Tables/AASM/S79-06-AASM-RWANDA.pdf

18. **Submarine Special Operations**. CLASSIFIED Special Submarine Operations service from 1 January 1993 to 12 May 1997 (dates TBC) was upgraded in 2019 to operational and qualifying service under the Veterans' Entitlements Act 1986 (VEA), also earning upgrade to the AASM from the ASM (Special Ops).

19. https://www.defence.gov.au/Operations/OpAccordion/

20. The AASM was also awarded for the following UN activity with respect to Vietnam 1975:
RAAF activities with TSF Butterworth to UNICEF 29 Mar - 28 Apr 75
RAAF activities with HQEISDET S to UNICEF 29 Mar 0 28 Apr 75

First RAAF mission was 2 April. RAAF acft/personnel relocated to Bangkok on 17 April and last Australian military personnel (RAAF) were evacuated from Saigon on 25 Apr 75.

Update 18

Research Contact:
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[redacted]

Appendix 4 - RCB RULES OF ENGAGEMENT 1978

RESTRICTED

RULES OF ENGAGEMENT — APPENDIX 3 TO ANNEX C

ENGAGEMENT BY FIRE

General

1. All troops are to be made aware, through briefing and discussions, of the difficulties of and necessity for, identifying friend from foe. Most Malaysians who have access to the Air Base, seldom carry identity cards and probably have only a vague awareness of authorized and unauthorized areas.

2. It is imperative that all ranks know and understand the rules of engagement and methods of ensuring own troops safety.

3. The most impertant implication of engagement by fire is 'IF IN DOUBT DO NOT SHOOT'.

Rules of Engagement

4. Application. The rules are to be applied within the Air Base regardless of curfew, periods of increased security, air defence exercises and time of day or night. All ranks operating within the Air Base are to be aware of friendly national organizations which operate within the Air Base.

5. Orders for Opening Fire. You may open fire at a person or persons only in the following circumstances:

a. If you are ordered to guard any building vehicle, aircraft, tent being used as a dwelling or as a place of storage, or you are ordered to guard the occupants of, or any property contained in each such building, vehicle, aircraft or tent you may open fire at any person who is in the act of destroying or damaging by fire or explosives the building, vehicle, aricraft or tent, or the property contained thereinPROVIDED THAT THERE IS NO OTHER MEANS OF PREVENTING THE PERSON FROM CARRYING OUT THE ACT OF DESTRUCTION OR DAMAGE.

b. If you or any other person is illegally attacked in such a way as to give you reason to fear that death or grave bodily injury will result, you may open fire on the person carrying out the attack PROVIDED THAT THERE IS NO OTHER MEANS OF PREVENTING THE PERSON FROM CARRYING OUT THE ATTACK.

6. Before opening fire you are to warn the person whom you intend to shoot of your intention to open fire unless he cases his illegal act. You should use the challenge 'HALT OR I FIRE - BERHENTI ATAU SAYA TEMBAK' repeated three times.

/ 7. At all times

7. At all times, before opening fire you must remember:

a. If in doubt do not shoot,

b. You must not fire unless this is the least force necessary to enable you to carry out the orders you have been given.

c. Shoot to wound and not to kill.

d. Use the minimum number of rounds necessary.

e. Your right to shoot ceases as soon as the necessity for protection has passed, ie, if your first round wounds the person so that he can no longer continue the act which caused you to open fire, you are not to shoot him again.

8. You are to take careful note of the fact that your right to shoot ceases at the Air Base boundary fence. You are not to shoot at a person on the other side of the fence.

Sentries on Protected Places

9. If you are posted as a sentry on a Protected Place, the provisions of paragraph 3 apply. However, if any person enters the Protected Place and whilst within the boundaries of the Protected Place fails to halt when challenged with the words 'HALT OR I FIRE - BERHENTI ATAU SAYA TEMBAK' repeated three times you may fire at him provided you are unable to stop him or to arrest him by any other means.

10. Similarly, should a person whom you have arrested within a Protected Place attempt to escape, you may shoot them subject to:

a. your having challenged them correctly in accordance with the prodedure given in paragraph 5; and

b. there being no other means of affecting their rearrest.

11. You are to take careful note of the fact that your right to shoot ceases if the person you challenge leaves the Protected Place, weather escaping from arrest or not. You must not shoot at such a person or any other at any time when they are outside the boundaries of the Protected Place, except within the provision of paragraphs 5 - 7.

Appendix 5

LIMITATIONS IN RCB RULES OF ENGAGEMENT

Extract #1: Deployment of Army Company to Butterworth – Directive (dated 4 Jan 1971)

'Limitations on employment of the company

9. Your company will be responsible at all times for the domestic security of its own lines at Butterworth, but will not be called upon for other guard or security duties, except in an emergency situation.

10. Malaysia has undertaken responsibility for the general security of Air Base Butterworth and is responsible for security measures outside the perimeter of the Base. The company is not to be used in aid of the civil power for the maintenance of internal law and order in civil disturbances.

11. The company is to be prepared at all times to take measures to assist in the protection of British, Australian and New Zealand Service personnel and their respective Government's property. To these ends you are to co-operate as necessary in an emergency with the Officer Commanding RAAF Base Butterworth and with the Malaysians in the local defence of the shared facilities at Air Base Butterworth. Subject to the specific considerations in paragraph 12 below your responsibilities will relate only to the area inside the perimeter of Air Base Butterworth.

12. The company may also be used to protect dependants of British, Australian and New Zealand forces. Further you are to be prepared to co-operate if authorized by the Australian and New Zealand Governments in such measures as may be arranged for the evacuation in an emergency of Australian, British, New Zealand and other friendly nationals.'[439]

Extract #2: ANZUK Directive (dated 19 Oct 1971)

'Limitations

3. The Malaysian authorities are responsible for the security of Air Base Butterworth and for security measures outside the perimeter of the Base. On no account is your company to be used in aid of the civil power for the maintenance of law and order in civil disturbances or for any purpose outside the terms of this directive.

4. Your responsibilities for the protection of ANZUK property at Air Base Butterworth and shared facilities are restricted to the area within the perimeter of the Base.

5. Your company will be responsible at all times for the domestic security of its own lines at Butterworth, but except as in para 2b(1)[440] *above will not be called upon for other guard or security duties such as the guarding of aircraft or bomb dumps, except in an emergency.'* [441]

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[439] *Deployment of Army Company to Butterworth – Directive*, Secretary of the Army, 4 Jan 1971, paras 9-12. (Doc 19710104), Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).
[440] Paragraph 2b(1) refers to assisting in the protection of ANZUK personnel, property and shared facilities within the perimeter of Air Base Butterworth in the event of civil disturbances.
[441] *ANZUK Force Directive to the OC Butterworth Company*, HQANZUK, 19 Oct 1971, paragraphs 3-5. (Document 19711019), Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

Extract #3: Directive by the GOC Field Force Command to the OC the Australian Rifle Company at Air Base Butterworth (dated 6 Mar 1978)

'Limitations

7. You are to ensure that:

a. unless authorized by CDFS, your company is not used in aid of the civil power;

b. your company is not employed operationally outside the Air Base Butterworth perimeter, except that in an emergency any part of it may be used to escort Australian personnel and their dependants, assets and property from Penang and Province Wellesely to Air Base Butterworth;

c. no contingency planning is undertaken with Malaysian authorities for the employment of your company other than for the defence of shared areas within the perimeter of Air Base Butterworth;

d. operational command or control of all or part of your company is not assigned to Malaysian authorities;

e. all ranks of your company know the action sentries may take when on duty in Protected Areas and Places; and

f. your company remains responsible at all times for the domestic security of its own lines at Butterworth. Your company will not be called upon for other guard or security duties such as guarding of aircraft or bomb dumps, except in an emergency.[442]

Extract #4: Directive by OC RAAF to OC Australian RCB, dated 04 Apr 1978

Limitations

5. Your area of operations for the protection of Australian assets, property and personnel is confined to those areas within Air Base Butterworth and its associated off-base RAAF-controlled installations. Your Company is only to deploy operationally outside such areas on my personal order or that of my Deputy Ground Defence Commander, RAAF.

Your Company is not to enter non-Australian occupied buildings on security

[442] *Directive by the GOC Field Force Command to the OC the Australian Rifle Company at Air Base Butterworth*, Malaysia, paragraph 7. (Document 19780306), Submission 66, Lieutenant Colonel Russell Linwood ASM (Retd).

Enclosure 2 to EC23-000372

Assessment of Rifle Company Butterworth Service using previous and current Australian Defence Force nature of service definitions

Background

2.1 The Tribunal requested Defence provide detailed, in-depth analysis of Rifle Company Butterworth service by reference to the uncontested assertions of fact and the terms of each of:

- The 1993 Cabinet endorsed definition of warlike service;
- The 1993 Cabinet endorsed definition of non-warlike service;
- The Ministerial 2018 updated definition of warlike service;
- The Ministerial 2018 updated definition of non-warlike service; and
- The Ministerial 2018 updated definition of peacetime service.

Defence Response

Introduction

2.2 The nature of service of any operation is determined by a number of elements of each definition of a nature of service classification. In 1993 the definitions of warlike service and non-warlike service were determined. These definitions were revised in 2018 to provide additional clarity on the definition of peacetime service as the terminology previously used that all operations determined for nature of service 'as other than warlike or non-warlike were classified as peacetime' was considered confusing. A definition of peacetime service was determined by Government in 2018.

Determining previous classification of Australian Defence Force service

2.3 Guiding the assessment of any current and past nature of service are the decisions made by Government and the Australian Defence Force chain of command. The senior committee in the Australian Defence Force is the Chiefs of Services Committee or COSC. The decision from the 2003 Chiefs of Services Committee has formed the basis of nature of service consideration.

2.4 In the 19 February 2003 Chiefs of Services Committee response to Government on the Review of Veterans' Entitlements (the Clarke Review)[5] it notes 'The COSC had an overriding concern with the approach taken by the Clarke Committee, which led to it recommending retrospectivity. The COSC did not support the concept of applying today's

[5] As discussed in Chief of the Defence Force minute 268/2003 to the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, 4 March 2003. Noted to the Hon Danna Vale MP on 13 April 2003.

standards and values … in determining the nature of service of military operations to past conflicts and operations'.[6]

2.5 Additionally 'The COSC took the view that military authorities made decisions and recommendations to Government about the operations for which they were responsible in good faith and drawing on the best intelligence and knowledge available at the time. In the opinion of the COSC, it would be confusing for personnel deployed on operations if decisions based on advice for the CDF could be overturned for no other reason than the emergence of different standards and values over time … This is not to suggest … that genuine anomalies should not be dealt with through the appropriate processes ….'[7]

Nature of Service and Medallic recognition

2.6 In the Cabinet decision JH00/0088 of 21 March 2000[8], which responded to the '*Review of Service Entitlements Anomalies, in respect of South-East Asian Service 1955 – 1975*', the Cabinet agreed 'the awarding of medals is not a suitable test for repatriation entitlements and, where appropriate, any such nexus be removed from the [Veterans' Entitlements] Act [1986]'.

2.7 This Cabinet Decision has previously been provided to the Defence Honours and Awards Appeals Tribunal.

Assertions of fact by Rifle Company Butterworth (1970-1989) Veterans

2.8 The Defence Honours and Awards Appeals Tribunal provided Defence with a number of assertions claimed by Rifle Company Butterworth Veterans to support the argument that their service was warlike. These are noted in Enclosure 1 to this submission.

2.9 This assessment against the nature of service classification will not consider the Royal Malaysian Air Force personnel, security and supporting civilian staff, and Royal Australian Air Force personnel located concurrently with Rifle Company Butterworth on Air Base Butterworth.

2.10 This assessment noted that Rifle Company Butterworth, average strength of about 130 personnel (less than 10% of Air Base Butterworth daily working population), were employed in Air Base Butterworth for periods of one month to three months non-continuously between 1970 and 1989 to provide an Army presence in Malaysia, support the security of Royal Australian Air Force aircraft and to conduct training. The Rifle Company Butterworth lived and worked alongside Royal Australian Air Force personnel and their families, with routine visits by Royal Australian Navy warships[9], where the ships'

[6] Ibid.
[7] Ibid.
[8] NAA: A14370, JH00/0088, 'Cabinet Submission JH00/0088 - Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-1975 - Decision JH00/0088/CAB'.
[9] Ship's company strength varied across the typical surface warship classes that visited Malaysian ports in the period 1970 to 1989 (approximately 200 for an Adelaide class guided missile frigate, 250 for a River class destroyer escort, 320 for a Daring class destroyer and 330 for a Charles F. Adams (Perth) class guided missile destroyer).

companies proceeded ashore on short leave. The deployment of Rifle Company Butterworth at Air Base Butterworth supported Australian foreign policy objectives and was underpinned by the Five Powers Defence Agreement.

2.11 Deployment of Rifle Company Butterworth was directed through various military documents and activities, which are routine steps to deploy and employ troops domestically and overseas. These are assessed to have been completed thoroughly and professionally. Most of the documentary records are publicly available and have been provided to the Tribunal and include:

a. Orders, Instructions and Administrative procedures that articulate the deployment and employment of personnel, roles and responsibilities, training and limitations, legal functions and controls to support the chain of command, and rules of engagement.

b. Individual overseas deployment preparation that directed that deployed troops, achieve Deployment Preparation state 1 (DP1), and the completion of individual Wills, jungle training and additional fitness to support acclimatisation, and live firing training.

c. Establishment of long range (out of home country) logistic and health support, including prepositioning ammunition of various natures to support training, establishing health capability and various recreation areas.

d. Conducting relevant contingency planning which included: routine re-employment, re-deployment and evacuation planning of Australian diplomatic, family and support staff, Australian Defence Force, Australian Defence Force families and other Australians as the Department of Foreign Affairs and Trade and the Australian Defence Force complete for any country.

2.12 With the volume of documents now available to the public and the Tribunal, Defence still cannot guarantee that all intelligence assessments and other classified documents supporting deployed forces, not just into Malaysia, at the time have been provided. The documents Defence has found, have been provided to the Tribunal and Veteran groups.

2.13 Most of the veteran assertions of particular activities e.g. DP1 status, preparing a Will, pre-deployment and arrival briefings, are used in a variety of situations and there is nothing about these that infer non-warlike or warlike service. Consideration of specific assertions including the carriage of live ammunition and the conduct of activities outside Air Base Butterworth, which have been suggested that they support further consideration of a particular nature of service, will be addressed separately at each definition.

Current process to determine the Nature of Service classification of a new Australian Defence Force operation

2.14 While the process is streamlined and communicated more quickly with today's technology, the process of determining an operation's nature of service has remained relatively consistent. In the conduct of planning for capability options for the Government, each new Australian Defence Force operation is initially evaluated against the Government approved nature of service definitions for the warlike, non-warlike and peacetime classifications. If the initial evaluation finds that the Australian Defence Force operation is appropriately classified as peacetime service, the Chief of the Defence Force's agreement is sought and the operation's classification remains peacetime. As no legislative action is required, the Government may be informed but no further Government endorsement of nature of service of the operation is required.

2.15 If the initial nature of service evaluation indicates that an Australian Defence Force operation may warrant a non-warlike or warlike classification, a more detailed assessment is conducted. Operational Headquarters, Health and Intelligence stakeholders contribute to the detailed nature of service assessment by considering factors within their area of expertise. Should this assessment determine that a non-warlike or a warlike classification is appropriate, a ministerial submission is provided to the Chief of the Defence Force to recommend to the Minister for Defence their approval of the particular nature of service classification.

Assessment of Rifle Company Butterworth service against the 1993 and 2018 definitions

2.16 The following assessment of Rifle Company Butterworth service against the 1993 and 2018 definitions requested by the Defence Honours and Awards Appeals Tribunal was conducted without support of the Defence Intelligence Group, Headquarters Joint Operations Command or Joint Health Command. The focus of these Defence commands is on current Australian Defence Force operational service, not reviews of historical records and research of previous Australian Defence Force service.

2.17 The assessment has reviewed data available to assess the records of functions and post operational ('end of tour') reports of Rifle Company Butterworth presence at Air Base Butterworth. This included: the tasks and missions undertaken by Rifle Company Butterworth, the threat assessments from the Joint Intelligence Organisation, and the rules of engagement issued for Rifle Company Butterworth duty. The assessment also took into account the Royal Australian Air Force and their families' presence and maintaining family married quarters, officers' and soldiers' clubs and accommodation that were located outside Air Base Butterworth or on Penang Island.

ASSESSMENT OF RIFLE COMPANY BUTTERWORTH SERVICE USING 1993 NATURE OF SERVICE DEFINITION – WARLIKE

Definition

2.18 Warlike operations are those military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties. These operations can encompass but are not limited to:

a. a state of declared war;

b. conventional combat operations against an armed adversary; and

c. Peace Enforcement operations which are military operations in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and may be engaged in combat activities. Normally but not necessarily always they will be conducted under Chapter VII of the United Nations Charter, where the application of all necessary force is authorised to restore peace and security or other like tasks.

Is Rifle Company Butterworth service (1970-1989) assessed as warlike service?

2.19 The following points provide an assessment against the key elements of the 1993 warlike definition:

- '*The application of force is authorised to pursue specific military objectives.*' The application of force that 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.[10]

    - A key task of Rifle Company Butterworth is to provide (additional) security to Royal Australian Air Force aircraft and personnel at Air Base Butterworth. The purpose of Rifle Company Butterworth stated in documented records was to maintain a presence in Malaysia, support security of Australian Defence Force assets and to conduct training.
    - The 1978 Unit Standing Orders for Rifle Company Butterworth (Attachment E) directed Rifle Company Butterworth personnel that 'If in doubt, do not shoot', reinforcing the careful consideration of the challenging domestic security of the

[10] The Australian Defence Force Glossary defines 'military objectives' as legitimate objects of attack and comprise:

a. all combatants who have a capacity and are willing to fight

b. establishments, buildings and locations at which the armed forces or their materials are located

c. other objects which, by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

air base, its proximity to the civilian population, development of housing and active farming adjacent the airstrip.

- The Australian Defence Force standing Rules of Engagement includes the right of self-defence in all Australian Defence Force activities domestically and wherever employed.[11]

- '*There is an expectation of casualties.*' There was no record of an expectation of casualties from Rifle Company Butterworth rotations. Non-battle casualties, including deaths by traffic accidents or misadventure, are not relevant to nature of service assessments.

  - There are no documents indicating an expectation of casualties within Rifle Company Butterworth or other Australian Defence Force members or Australian families during the period 1970 to 1989.
  - No. 4 RAAF Hospital at Butterworth was established because the British hospital at Taiping was closing in 1965, and Australia found it necessary to provide alternative hospital and health facilities for the thousands of personnel from the Royal Australian Air Force, Royal Air Force, Australian and British Army, and their dependants.[12] No. 4 RAAF Hospital was not established because of an increased external threat from an Australian adversary.

- '*A state of declared war.*' Australia did not declare or recognise that a state of war existed in Malaysia and was not involved in internal Malaysian affairs.
  - The Government of Malaysia did not ask Australia for military assistance after 14 September 1966, which marked the end of the Indonesian Confrontation.
- '*Conventional combat operations against an armed adversary.*' Rifle Company Butterworth did not conduct authorised conventional or any other combat operations against any adversary. Rifle Company Butterworth carried out garrison (in similar terminology - Port, Base, or Barracks) security duty and was not authorised to carry out patrols, i.e. searching for an adversary, outside Air Base Butterworth.

  - Rifle Company Butterworth was not authorised to conduct offensive operations or to use force to achieve a military objective. Rifle Company Butterworth was not to be involved in internal Malaysian affairs, local civil disturbances, or to be employed in security operations outside the gazetted area of the Air Base Butterworth. Rifle Company Butterworth was not authorised to undertake offensive patrols outside the confines of Air Base Butterworth. There were training activities in designated training areas outside the base.

[11] 'CDF ROEAUTH – Standing Rules of Engagement Serial Five' (reissued from time to time).
[12] Royal Australian Air Force press release S3869/65, 'New RAAF Hospital at Butterworth Malaysia', 2 March 1965, states "The Minister for Air, Mr Peter Howson, said today that the hospital would be known as No 4 RAAF Hospital, Butterworth, Mr Howson said that with the decision to close down the British Military Hospital at Taiping early in 1965, it had been found necessary to provide alternative hospital facilities for RAAF, RAF, Australian and British Army personnel and their dependents in the area.", accessed at ParlInfo - New RAAF hospital at Butterworth Malaysia (aph.gov.au).

- '*Peace Enforcement operations.*' Rifle Company Butterworth service was not a Peace Enforcement operation. The Australian Defence Force was not authorised to be involved in internal Malaysian affairs. Standard duty was confined to security of Australian Defence Force assets and training in designated training areas when available.
- The overall risk associated with Rifle Company Butterworth security and training tasks was low. This is based on intelligence assessments from the Joint Intelligence Organisation, which assessed the threat of communist terrorist attack on Air Base Butterworth as unlikely and threat, low.
    - Threat assessments are routinely produced for Australian Defence Force operations and activities, including peacetime operations, other activities and training exercises.

Addressing other Rifle Company Butterworth veteran assertions

2.20 The carriage of live ammunition is not a consideration when determining nature of service. However the intent to use any nature of ammunition might be a consideration. The intent to use ammunition is directed through Orders For Opening Fire and Rules of Engagement associated with the task and purpose of a mission. As the Rules of Engagement for Rifle Company Butterworth were defensive only and further clarified by additional orders, as noted in numerous examples, to include 'If in doubt, do not shoot' reinforces that no armed adversary was expected and that there is no intent to use the ammunition unless absolutely necessary for defensive purposes.

2.21 The carriage of live ammunition is explained in records for safety and other purposes including wild animal threats. The added burden, stress and risk of carrying live rounds is acknowledged but not a consideration for nature of service classification.

2.22 Defence notes that the use of the term 'War Service' for disciplinary matters has an extensive history. In particular, paragraph 44 of the Explanatory Memorandum to the Defence Force Discipline Bill 1982 explained the codes of discipline for the Army prior to the introduction of the legislation. Specifically, it was noted that "the expression 'war service' is something of a misnomer because … it not only includes service in time of war, but also active service … and all service outside Australia in time of peace".[13] As such, the statement 'Whilst on War Service' reflected the military discipline arrangements and processes applicable to units deployed overseas. It provided increased powers of punishment for officers commanding and commanding officers of units deployed overseas, and does not refer to a nature of service classification.

Summary

2.23 It is assessed that Rifle Company Butterworth service (1970-1989) did not meet the elements of the 1993 'warlike' definition.

[13] Defence Force Discipline Bill 1982, Explanatory Memorandum, para. 44, accessed at ParlInfo - Defence Force Discipline Bill 1982 (aph.gov.au).

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ASSESSMENT OF RIFLE COMPANY BUTTERWORTH SERVICE USING 1993 NATURE OF SERVICE DEFINITION – NON-WARLIKE

Definition

2.24 Non-warlike operations are defined as those military activities short of warlike operations where there is risk associated with the assigned task(s) and where the application of force is limited to self-defence. Casualties could occur but are not expected. These operations encompass but are not limited to:

a. *Hazardous*. Activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty such as mine avoidance and clearance, weapons inspections and destruction, Defence Force aid to civil power, Service protected or assisted evacuations and other operations requiring the application of minimum force to effect the protection of personnel or property, or other like activities.

b. *Peacekeeping*. Peacekeeping is an operation involving military personnel, without powers of enforcement, to help restore and maintain peace in an area of conflict with the consent of all parties. These operations can encompass but are not limited to:

(1) Activities short of Peace Enforcement where the authorisation of the application of force is normally limited to minimum force necessary for self-defence;

(2) Activities, such as the enforcement of sanctions in a relatively benign environment which expose individuals or units to “hazards” as described above;

(3) Military observer activities with the tasks of monitoring ceasefires, re-directing and alleviating ceasefire tensions, providing “good offices” for negotiations and the impartial verification of assistance or ceasefire agreements, and other like activities; or

(4) Activities that would normally involve the provision of humanitarian relief.

Notes

2.25 Humanitarian relief in this context does not include normal peacetime operations such as cyclone or earthquake relief flights or assistance.

2.26 Peacemaking is frequently used colloquially in place of Peace Enforcement. However, in the developing doctrine of peace operations, Peacemaking is considered as the diplomatic process of seeking a solution to a dispute through negotiation, inquiry, mediation, conciliation or other peaceful means.

Is Rifle Company Butterworth service (1970-1989) assessed as non-warlike service?

2.27 The 1993 ‘warlike’ considerations noted above remain extant. The following points provide a further assessment against the key elements of the 1993 ‘non-warlike’ definition:

a. '*There is risk associated with the assigned task(s).*' The Joint Intelligence Organisation always assessed the threat of communist terrorist attack on Air Base Butterworth as LOW and unlikely.

(1) Threat assessments are routinely produced for Australian Defence Force operations and activities, including peacetime operations, other activities and exercises.

(2) Rifle Company Butterworth Rules of Engagement were defensive, which included the right of self-defence. The 1978 Unit Standing Orders for Rifle Company Butterworth directed Rifle Company Butterworth personnel that 'If in doubt, do not shoot', reinforcing the careful consideration of the challenging domestic security of the air base, its proximity to the civilian population, development of housing and active farming adjacent the airstrip.

b. Hazardous. Rifle Company Butterworth service did not include *mine avoidance and clearance, weapons inspections and destruction, Defence Force (ADF) aid to civil power, Service protected or assisted evacuations.*

(1) Evacuation plans for Australian Defence Force and families from Butterworth were developed by the Royal Australian Air Force before Rifle Company Butterworth rotations commenced. These plans were refined to include Army infantry rifle companies once the company rotations began. There was no consideration by Government or Defence across the period of initiating an evacuation of Royal Australian Air Force families or Australian Defence Force personnel. The development of such contingency plans is normal foreign affairs and military procedure.

(2) The conduct of contingency planning does not equate to actually facing a hostile force.

c. Hazardous. ... other operations requiring the application of minimum force to effect the protection of personnel or property, or other like activities

(1) The Ground Defence Operations Centre at the Air Base Butterworth was established to manage all types of emergencies at the air base, including security related emergencies. The Officer Commanding Royal Australian Air Force Base Butterworth was responsible for the command of the Ground Defence Operations Centre and the Officer Commanding the infantry rifle company was appointed as one of the ground defence advisers to support the operation of the Operations Centre. While the Ground Defence Operations Centre was exercised on a regular basis, especially during air defence exercises, simulation of a declared emergency or in the movement of highly

inflammable material, there is no record of a security emergency being declared at Royal Australian Air Force Base Butterworth over the period. [14]

(2) Examples of the activity level include:

i. An account attributed to Major R. Chandler, Officer Commanding C Company, 2 Battalion, Royal Australian Regiment at Butterworth in the period 14 February to 23 May 1979, states the tour of Butterworth was "… an ideal opportunity for the Company to train without the interruptions which often occur in a training programme in Australia' (Attachment F). A 'Researcher's Comment' of unknown provenance says in part 'There was nothing approaching operational activities against a live enemy at any stage during the C Coy 2/4 RAR sojourn at Butterworth.'[15]

ii. The End of Tour Report by the Officer Commanding B Company, 1 Battalion, Royal Australian Regiment (then Major R.J. Linwood) for the period 9 December 1981 to 17 February 1982 is primarily about training, discipline and medical issues (Attachment G).[16] The section on the Quick Reaction Force states "No real incidents occurred, however twice daily and twice nightly the QRF was reacted on drill call-outs. No operational tasks were issued by OC RAAF Base BUTTERWORTH". Security levels were increased over certain periods as a routine precaution.[17] The report concludes, "With the exception of three soldiers, the entire company have gained valuable experience in a semi-operational Asian environment."[18] Then Major Linwood's End of Tour report is consistent with other available End of Tour reports (Attachments H to O inclusive).

d. Other considerations to determine if the elements of the hazardous definition were met for non-warlike nature of service include:

(1) Rifle Company Butterworth provided a Quick Reaction Force in case of an intrusion onto Air Base Butterworth, in support of the Ground Defence Operations Centre. The Quick Reaction Force, which was exercised frequently, was never called to action in response to an actual documented intrusion by an adversary. Records of investigating broken fence lines or 'breaches' at Air Base Butterworth are noted to have been discovered however the gaps were assessed as having been there for some time, i.e. potentially a routine activity by the local population.

[14] See NAA: A9186, 198, 'RAAF Unit History sheets (Form A50) [Operations Record Book - Forms A50 and A51] Base Squadron Butterworth Jun 66 - Dec 87'; and NAA: A9435, 75, 'Commanding Officers' reports - Monthly reports unit history sheets (A50) - Base Squadron, Butterworth, 1944 to 1988'. Both records are digitised.
[15] Chandler, Major R., 'C Coy 2/4 RAR Tour of Air Base Butterworth 14 Feb – 23 May 79', undated.
[16] 'End of Tour Report by B Coy 1 RAR, 9 Dec 81 - 17 Feb 82', 16 February 1982. Inconsistences appear when comparing Mr Linwood's End of Tour report with his submission to this Inquiry.
[17] Ibid., paras. 8-12.
[18] Ibid., para. 73.

(2) Normal daily life for the Royal Australian Air Force families continued throughout the period. Royal Australian Air Force families were located either in the married quarters on the other side of the major highway from Air Base Butterworth or on Penang Island, in the suburbs. Royal Australian Air Force personnel and families were allowed to visit other areas of Malaysia with the exception of the Thai/Malaysia border area. Access to the married quarter areas was open, i.e. no special security arrangements, for the entire 20 year period of 1970 to 1989.

(3) The Officers and Sergeants Mess were located adjacent and off Air Base Butterworth, i.e. across the highway from Air Base Butterworth, and had no security restrictions imposed, i.e. no assessed threat to personnel.

(4) Single (unaccompanied) Royal Australian Air Force personnel were permitted to live off base.

(5) Throughout the period 1970 to 1989, the Royal Australian Navy continued to make peacetime port calls (Australian presence to support regional stability) and conduct routine local leave ashore.

(6) Rifle Company Butterworth personnel were allowed to visit bars, restaurants and shops in Butterworth town and on the island of Penang. No additional security measures were taken for these visits.

e. Noting this routine pattern of life for those Australian Defence Force personnel and others at Butterworth, Rifle Company Butterworth duty at Air Base Butterworth was not considered *hazardous* as considered in the non-warlike definition.

f. *Peacekeeping.*

(1) Rifle Company Butterworth did not support the Government of Malaysia, the United Nations or other body such as the Multinational Force and Observers maintain peace or security in Malaysia. The Government of Malaysia did not ask Australia for any assistance after September 1966, the end of the Indonesian Confrontation.

(2) Rifle Company Butterworth was not authorised in the application of force other than as directed by the specific defensive rules of engagement in support of security of Australian Defence Force assets and personnel on Air Base Butterworth.

(3) Rifle Company Butterworth was not tasked with enforcement of sanctions or other tasks that might expose them to hazards relating to this task.

(4) Rifle Company Butterworth were not Military Observers monitoring in-country tensions.

(5) Rifle Company Butterworth was not tasked as a part of any Australian operation to provide humanitarian relief in any location in Malaysia.

g. Noting the elements of *Peacekeeping* in the 1993 non-warlike definition it is assessed that Rifle Company Butterworth did not fulfil any of these roles and therefore its service was not assessed as *Peacekeeping*.

2.28 The carriage of live ammunition is addressed in the assessment of warlike nature of service and the considerations are the same.

2.29 Consistent with the nature of service warlike consideration, the term 'Whilst on War Service' and supporting definitions provided increased powers of punishment for officers commanding and commanding officers of units deployed overseas, and does not refer to a nature of service classification.

Summary

2.30 It is assessed that Rifle Company Butterworth service (1970-1989) did not meet the elements of the 1993 'non-warlike' definition and therefore remains classified as peacetime service. Peacetime service was further defined in the 2018 definitions were endorsed by Government.

ASSESSMENT OF RIFLE COMPANY BUTTERWORTH SERVICE USING 2018 NATURE OF SERVICE DEFINITION – WARLIKE

Definition

2.31 *Warlike* service exposes Australian Defence Force personnel to a direct risk of *harm* from *hostile forces*.

2.32 A *warlike* operation is an Australian Government authorised military operation where Australian Defence Force personnel are exposed to the risk of *harm* from *hostile forces* that have been assessed by Defence as having the capability and an identified intent to directly target Australian Defence Force personnel. Australian Defence Force personnel are authorised to use force to pursue specific military objectives and there is an expectation of Australian Defence Force casualties as a result.

Notes

2.33 *Harm*. The Nature of Service classification of Australian Defence Force operational service is based on an assessment of the level of exposure to the risk of harm – both physical and psychological – from hostile forces, but not environmental factors which are recognised elsewhere in the Australian Defence Force remuneration framework and the conditions of service package.

2.34 *Hostile Forces*. Hostile forces comprise military, paramilitary or civilian forces, criminal elements or terrorists, with or without national designation, that have committed a hostile act, exhibited hostile intent, or have been designated hostile by the Australian Government.

2.35 *Threat Assessment*. For the purposes of the Nature of Service definitions, the level of threat from hostile forces must be derived from an authorised assessment provided by the Defence Intelligence Organisation or Headquarters Joint Operations Command - J2 (Joint Operations - Intelligence).

2.36 *Terrorism*. A general threat of terrorism which does not specify a direct threat to Australian Defence Force personnel does not predicate a higher Nature of Service classification than peacetime. To classify an Australian Defence Force operation as other than peacetime based on terrorism, there must be a Defence identified specific threat to the Australian Defence Force presence.

Is Rifle Company Butterworth Service (1970-1989) assessed as warlike service?

2.37 The following points provide an assessment against the key elements of the 2018 warlike definition:

a. *Direct risk of harm from hostile forces.* Threat assessments are routinely produced for Australian Defence Force operations and activities, including peacetime operations, other activities and exercises. Risks of harm from hostile forces associated with Rifle Company Butterworth tasks was assessed as unlikely and low throughout the period and

aligned with the Joint Intelligence Organisation which always assessed the threat of communist terrorist attack on Air Base Butterworth as unlikely and threat, low.

b. *An identified intent to directly target Australian Defence Force personnel*. In the 20 year period of 1979 to 1989, intelligence and threat assessments consistently noted that communist terrorists were unlikely to attack Air Base Butterworth. In the period there were no recorded attacks or offensive action by hostile forces made on Air Base Butterworth. There are no reports of any intent to directly target Australian Defence Force personnel on or off duty or the Royal Australian Air Force families resident adjacent Air Base Butterworth or on Penang Island.

c. *Direct risk of harm from hostile forces …authorised to use force to pursue specific military objectives*. The Australian Defence Force, including Rifle Company Butterworth and Royal Australian Air Force aircraft, were not authorised to be involved in internal Malaysian affairs. There are no records of Australian Defence Force personnel being directly or indirectly involved in any clashes, incidents or events between communist terrorists or in support of Malaysian authorities conducting military operations. An objective for Rifle Company Butterworth, more appropriately designated as a task, was to provide security to Royal Australian Air Force aircraft at Air Base Butterworth. There is no record of the Rifle Company Butterworth security task involving contact with any hostile forces.

d. *Direct risk of harm from hostile forces …authorised to use force to pursue specific military objectives …an identified intent to directly target Australian Defence Force personnel… expectation of Australian Defence Force casualties.* Rifle Company Butterworth service was not part of an Australian Government authorised military operation against a hostile force. There was no identified threat of an intent to directly or indirectly target Australian Defence Force personnel. Rifle Company Butterworth was not authorised to use force to pursue specific military objectives. The Rifle Company Butterworth security task was limited to the gazetted area of the Air Base Butterworth. There are no records that indicate an expectation of casualties for those Australian Defence Force personnel employed at Air Base Butterworth or from Rifle Company Butterworth.

e. *Authorised to use force to pursue specific military objectives*.[19] Rifle Company Butterworth was not authorised to conduct offensive operations or to use force to achieve a military objective. Rifle Company Butterworth was not to be involved in internal Malaysian affairs or local civil disturbances or to be employed in security tasks outside the gazetted area of Air Base Butterworth. Rifle Company Butterworth did not undertake authorised offensive patrols outside the confines of Air Base Butterworth. There are records of training activities in designated training areas.

f. *Authorised to use force to pursue specific military objectives*. Rifle Company Butterworth Rules of Engagement were defensive, which included the right of self-defence. The 1978 Unit Standing Orders for Rifle Company Butterworth reinforced

[19] As defined in the Australian Defence Force Glossary (see footnote 10).

the additional care to be taken with the defensive rules of engagement which directed Rifle Company Butterworth personnel that 'If in doubt, do not shoot'. Reports of Malay local nationals intruding onto the base from time to time and incidents of theft were recorded.

g. *Terrorism.* Harm, hostile forces and threat assessment have been addressed above. The clarification in the 2018 definition of warlike includes the qualifier that 'To classify an Australian Defence Force operation as other than peacetime based on *terrorism*, there must be a Defence identified specific threat to the Australian Defence Force presence'. As there is no record of a specific threat or terrorist threat to the Australian Defence Force presence at Air Base Butterworth throughout the period 1979 to 1989, the threat of terrorism was not considered likely and therefore does not support Rifle Company Butterworth meeting the definition of warlike service.

2.38 Considering the elements of the 2018 warlike definition against Rifle Company Butterworth service it is assessed that the Company was not in direct risk of harm from hostile forces. The risk of attack or harm at their workplace, Air Base Butterworth, was assessed as unlikely or low. There are no records of offensive action or an attack taking place at Air Base Butterworth. There is no record of there being an expectation of casualties. The Rifle Company Butterworth task was to maintain security of Australian Defence Force assets, namely Royal Australian Air Force aircraft on Air Base Butterworth. This involved security duties and a quick reaction force, prepared to be on short notice, to support security of the Air Base Butterworth. This is considered peacetime duty.

Addressing other Rifle Company Butterworth veteran assertions

2.39 The carriage of live ammunition is not a consideration when determining nature of service. However the intent to use any nature of ammunition might be a consideration. The intent to use ammunition is directed through Orders For Opening Fire and Rules of Engagement associated with the task and purpose of a mission. As the rules of engagement for Rifle Company Butterworth were defensive only and further clarified by additional orders, as noted in numerous examples, to include 'If in doubt, do not shoot' reinforces that no armed adversary was expected and that there was no intent to use the ammunition unless absolutely necessary for defensive purposes.

2.40 The carriage of live ammunition is explained in records for safety and other purposes including wild animal threats. The added burden, stress and risk of carrying live rounds is acknowledged but not a consideration for nature of service classification. The weapons' status of 'load', 'action' and 'instant' are directions given by local commanders subject to the circumstances presented to them at the time, including during training.

2.41 Defence notes, for this definition also, that the use of the term 'War Service' for disciplinary matters has an extensive history. In particular, paragraph 44 of the Explanatory Memorandum to the Defence Force Discipline Bill 1982 explained the codes of discipline for the Army prior to the introduction of the legislation. Specifically, it was noted that "the expression 'war service' is something of a misnomer because … it not only includes

service in time of war, but also active service … and all service outside Australia in time of peace". As such, the statement 'Whilst on War Service' reflected the military discipline arrangements and processes applicable to units deployed overseas. It provided increased powers of punishment for officers commanding and commanding officers of units deployed overseas, and does not refer to a nature of service classification

Summary

2.42 It is assessed that Rifle Company Butterworth service (1970-1989) did not meet the elements of the 2018 'warlike' definition.

ASSESSMENT OF RIFLE COMPANY BUTTERWORTH SERVICE USING 2018 NATURE OF SERVICE DEFINITION – NON-WARLIKE

Definition

2.43 *Non-warlike* service exposes Australian Defence Force personnel to an indirect risk of *harm* from *hostile forces*.

2.44 A *non-warlike* operation is an Australian Government authorised military operation which exposes Australian Defence Force personnel to the risk of *harm* from designated forces or groups that have been assessed by Defence as having the capability to employ violence to achieve their objectives, but there is no specific threat or assessed intent to target Australian Defence Force personnel. The use of force by Australian Defence Force personnel is limited to self-defence and there is no expectation of Australian Defence Force casualties as a result of engagement of those designated forces or groups.

Notes

2.45 *Harm*. The Nature of Service classification of Australian Defence Force operational service is based on an assessment of the level of exposure to the risk of harm – both physical and psychological – from hostile forces, but not environmental factors which are recognised elsewhere in the Australian Defence Force remuneration framework and the conditions of service package.

2.46 *Hostile Forces*. Hostile forces comprise military, paramilitary or civilian forces, criminal elements or terrorists, with or without national designation, that have committed a hostile act, exhibited hostile intent, or have been designated hostile by the Australian Government.

2.47 *Threat Assessment*. For the purposes of the Nature of Service definitions, the level of threat from hostile forces must be derived from an authorised assessment provided by the Defence Intelligence Organisation or Headquarters Joint Operations Command - J2 (Joint Operations - Intelligence).

2.48 *Terrorism*. A general threat of terrorism which does not specify a direct threat to Australian Defence Force personnel does not predicate a higher Nature of Service classification than peacetime. To classify an Australian Defence Force operation as other than peacetime based on terrorism, there must be a Defence identified specific threat to the Australian Defence Force presence.

Is Rifle Company Butterworth service (1970-1989) assessed as non-warlike service?

2.49 The 2018 ‘warlike’ considerations noted above remain extant. The following points provide a further assessment against the key elements of the 2018 ‘non-warlike’ definition:

a. Hostile forces. *A general threat of terrorism which does not specify a direct threat to Australian Defence Force personnel does not predicate a higher Nature of Service classification than peacetime (relevant throughout)*. Communist terrorists in Malaysia

were acknowledged as insurgents that employed violence to achieve their objectives. While violence was recorded as utilised against Malaysian authorities, there were no attacks against Australian Defence Force or civilian personnel or equipment, including against unarmed off-duty personnel and families moving freely within the local community and touring Malaysia. The threat assessments for an attack or threat against Air Base Butterworth, the Rifle Company Butterworth primary work location and location of its security responsibilities, were consistently assessed as an attack is unlikely and the threat, low.

b. Rifle Company Butterworth was not authorised to conduct offensive operations. Rifle Company Butterworth was not to be involved in internal Malaysian affairs or local civil disturbances or to be employed in security operations outside the gazetted area of the Air Base Butterworth. Rifle Company Butterworth did not undertake authorised combat patrols outside the confines of Air Base Butterworth. There were training activities in designated training areas.

c. The Rules of Engagement for Rifle Company Butterworth for nightly Australian Defence Force asset (Royal Australian Air Force aircraft) security and the conduct of Quick Reaction Force responsibilities were defensive.

d. Rifle Company Butterworth Rules of Engagement were defensive, which included the right of self-defence. The 1978 Unit Standing Orders for Rifle Company Butterworth directed Rifle Company Butterworth personnel that ‘If in doubt, do not shoot’, reinforcing the careful consideration of the challenging domestic security of the air base, its proximity to the civilian population, development of housing and active farming adjacent the airstrip.

e. Normal daily life for the Royal Australian Air Force families and community continued throughout the period.

    (1) Royal Australian Air Force families were located either in the married quarters on the other side of the major highway from Air Base Butterworth or on Penang Island. Royal Australian Air Force personnel and families were allowed to visit other areas of Malaysia apart from the Thai/Malaysia border area. Access to the married quarter areas had no documented additional security measures in place for the 20 year period.

    (2) The Officers and Sergeants Mess were adjacent and not on Air Base Butterworth and had no documented additional security measures.

    (3) Single (unaccompanied) Royal Australian Air Force personnel were permitted to live off base.

    (4) Throughout the period 1970 to1989, the Royal Australian Navy continued to make unrestricted port calls (Australian presence to support regional stability) and conduct routine local leave ashore.

    (5) Rifle Company Butterworth personnel were allowed to visit bars, restaurants and shops in Butterworth town and on the island of Penang. No documented additional security measures were taken for these visits.

(6) Although evacuation plans were developed for Australian personnel at Air Base Butterworth, these plans were never activated. Evacuation plans for Australian Defence Force personnel and families from Butterworth were developed by the Royal Australian Air Force before Rifle Company Butterworth rotations commenced. These plans were refined to include Army infantry rifle companies once the company rotations began. There was no recorded consideration by Government or Defence across the 1970 to 1989 period of initiating an evacuation of Royal Australian Air Force families or Australian Defence Force personnel from Butterworth or Malaysia. The development of such contingency plans is normal foreign affairs and military procedure.

(7) The conduct of contingency planning does not equate to actually facing a hostile force.

f. *Risk associated with Rifle Company Butterworth tasks*. The Joint Intelligence Organisation always assessed the threat of communist terrorist attack on Air Base Butterworth as LOW and unlikely. Rifle Company Butterworth was not under any indirect risk of harm from hostile forces.

g. *Terrorism*. Communist terrorist activity in Malaysia over the period 1970 to 1989 is acknowledged. However, there was no evidence of a specific threat or intent from communist terrorists toward the Australian Defence Force presence at Air Base Butterworth. As noted in the nature of service non-warlike definition, "A general threat of terrorism which does not specify a direct threat to Australian Defence Force personnel does not predicate a higher Nature of Service classification than peacetime."

2.50 Considering the elements of the non-warlike definition against Rifle Company Butterworth (1970-1989) service it is assessed that the Rifle Company Butterworth was not under any indirect risk of harm from hostile forces. Threat assessments for communist terrorist attack at Rifle company Butterworth's workplace, Air Base Butterworth, was assessed as unlikely or low. There are no records of offensive action or an attack taking place at Air Base Butterworth. There is no record of there being an expectation of casualties.

Addressing other Rifle Company Butterworth veteran assertions

2.51 The carriage of live ammunition is not a consideration when determining nature of service. This consideration was addressed in the assessment of the elements of the 2018 warlike definition and remains relevant.

2.52 However, the intent to use any nature of ammunition should be considered. The intent to use ammunition is directed through Orders For Opening Fire and Rules of Engagement associated with the task and purpose of a mission. As the rules of engagement for Rifle Company Butterworth were defensive only and further clarified by additional orders, as noted in numerous examples, to include 'If in doubt, do not shoot' reinforces that no armed adversary was expected, and that there is no intent to use the ammunition unless absolutely necessary for defensive purposes.

2.53 The carriage of live ammunition is explained in records for safety and other purposes including wild animal threats. The added burden, stress and risk of carrying live rounds is acknowledged but not a specific consideration for nature of service classification. The weapons' status of 'load', 'action' and 'instant' are directions given by local commanders subject to the circumstances presented to them at the time, including during training.

2.54 Consistent with nature of service 2018 warlike consideration, the term 'Whilst on War Service' and supporting definitions provided increased powers of punishment for officers commanding and commanding officers of units deployed overseas, and does not refer to a nature of service classification.

Summary

2.55 It is assessed that Rifle Company Butterworth service (1970-1989) did not meet the elements of the 2018 'non-warlike' definition.

ASSESSMENT OF RIFLE COMPANY BUTTERWORTH SERVICE USING 2018 NATURE OF SERVICE DEFINITION – PEACETIME

Definition

2.56 A *peacetime* classification acknowledges that an element of hazard and risk is inherent to Australian Defence Force service and that personnel are appropriately trained and compensated for their specific military occupation. Service on *peacetime* operations is not the same as serving overseas on a posting or short-term duty.

2.57 A *peacetime* operation is an Australian Government authorised military operation or activity that does not expose Australian Defence Force personnel to a Defence-assessed threat from *hostile forces*. Therefore, there is no expectation of casualties as a result of engagement with hostile forces. There may be an increased risk of harm from environmental factors consistent with the expectation that Australian Defence Force personnel will from time to time perform hazardous duties.

2.58 *Harm*. The Nature of Service classification of Australian Defence Force operational service is based on an assessment of the level of exposure to the risk of harm – both physical and psychological – from hostile forces, but not environmental factors which are recognised elsewhere in the Australian Defence Force remuneration framework and the conditions of service package.

2.59 *Hostile Forces*. Hostile forces comprise military, paramilitary or civilian forces, criminal elements or terrorists, with or without national designation, that have committed a hostile act, exhibited hostile intent, or have been designated hostile by the Australian Government.

2.60 *Threat Assessment*. For the purposes of the Nature of Service definitions, the level of threat from hostile forces must be derived from an authorised assessment provided by the Defence Intelligence Organisation or Headquarters Joint Operations Command-J2 (Joint Operations - Intelligence).

2.61 *Terrorism*. A general threat of terrorism which does not specify a direct threat to Australian Defence Force personnel does not predicate a higher Nature of Service classification than peacetime. To classify an Australian Defence Force operation as other than peacetime based on terrorism, there must be a Defence identified specific threat to the Australian Defence Force presence.

Is Rifle Company Butterworth service (1970-1989) assessed as peacetime service?

2.62 The 2018 ‘warlike’ and ‘non-warlike’ considerations noted in the elements of the 2018 definitions above remain extant.

2.63 Australian Defence Force service defaults to peacetime service unless determined by the Minister for Defence to be warlike or non-warlike service. As assessments of Rifle Company Butterworth service under the 2018 Nature of Service definitions have not

returned either a warlike or non-warlike classification, Rifle Company Butterworth service is therefore classified as peacetime service.

2.64 *A peacetime classification acknowledges that an element of hazard and risk is inherent to Australian Defence Force service*. The purpose of Rifle Company Butterworth deployments was to continue an Australian Army presence in Malaysia after the relocation of the Australian infantry battalion from Terendak to Singapore in 1970. Other roles of the Rifle Company Butterworth were to assist in the security of Australian Defence Force assets at Air Base Butterworth, and to conduct training, either independently or with the Malaysian Armed Forces. The first two outcomes are recorded as being achieved. Documents record the opportunities to train with the Malaysian Armed Forces, in particular the Army elements, was inconsistent.

2.65 The following points provide a further assessment against the key elements of the 2018 'peacetime' service definition:

a. While assessing the elements of this 2018 definition against historical records Defence notes there is no documentary record of any attacks against Air Base Butterworth or Australian Defence Force personnel or assets at Air Base Butterworth throughout the period 1970 to 1989.

b. Rifle Company Butterworth was not an authorised Australian Defence Force military operation against a hostile force. The security tasks conducted by Rifle Company Butterworth at Air Base Butterworth were authorised, as were training activities.

c. The Joint Intelligence Organisation assessed that a communist terrorist attack on Air Base Butterworth, the work location of Rifle Company Butterworth, was unlikely and the threat was low.

d. There was no expectation of casualties as there was not expected to be an engagement with hostile forces. Both Rifle Company Butterworth and Royal Australian Air Force aircraft were not authorised to be involved in internal Malaysian affairs nor therefore drawn into direct contact with a hostile force.

e. There are no documented attacks against the Air Base Butterworth for the period under consideration and no related casualties.

f. The environmental factors are consistent with the expectation that Australian Defence Force personnel will from time to time perform hazardous duties within a peacetime environment. Tropical weather and lengthy overnight duty do not alter a peacetime assessment.

g. *Terrorism*. Communist terrorist activity in Malaysia over the period 1970 to 1989 is acknowledged. However, there was no evidence of a specific threat or intent from communist terrorists toward the Australian Defence Force presence at Air Base Butterworth. As noted in the 2018 definitions, "A general threat of terrorism which does

not specify a direct threat to Australian Defence Force personnel does not predicate a higher Nature of Service classification than peacetime."

h. All other aspects of this service noted against the elements of the definition of warlike/non-warlike are also taken into account.

2.66 In considering the elements of the peacetime definition against Rifle Company Butterworth (1970-1989) service it is assessed that the Company was not under any direct or indirect risk of harm from hostile forces. Threat assessments for communist terrorist attack at Rifle Company Butterworth's workplace, Air Base Butterworth, was assessed as unlikely and the threat as low. There are no records of offensive action or an attack taking place at Air Base Butterworth. There is no record of there being an expectation of casualties.

Addressing other Rifle Company Butterworth veteran assertions

2.67 The carriage of live ammunition is not a consideration when determining nature of service. This consideration was addressed in the assessment of the elements of the 2018 warlike and non-warlike definitions and remains relevant.

2.68 As the rules of engagement for Rifle Company Butterworth were defensive only and further clarified by additional orders, as noted in numerous examples, to include 'If in doubt, do not shoot' reinforces that no armed adversary was expected, and that there is no intent to use the ammunition unless absolutely necessary for defensive purposes.

2.69 The carriage of live ammunition is explained in records for safety and other purposes including wild animal threats. The added burden, stress and risk of carrying live rounds is acknowledged but not a specific consideration for nature of service classification however it does meet the elements of the definition in that *peacetime classification acknowledges that an element of hazard and risk is inherent to Australian Defence Force service.*

2.70 Additionally the definition addresses this consideration *and that personnel are appropriately trained and compensated for their specific military occupation*. There are many examples of Rifle Company Butterworth's preparation, training, briefings, and live fire activities to support readiness and its likely tasks at Air Base Butterworth.

2.71 As considered in the warlike and non-warlike assessments the weapons' status of 'load', 'action' and 'instant' are directions given by local commanders subject to the circumstances presented to them at the time, including during training.

2.72 Consistent with the nature of service warlike and non-warlike considerations, the term 'Whilst on War Service' and supporting definitions provided increased powers of punishment for officers commanding and commanding officers of units deployed overseas, and does not refer to a nature of service classification.

Summary

2.73 It is assessed that Rifle Company Butterworth service (1970-1989) meets the elements of the 2018 'peacetime' definition.

Conclusion

2.74 The aforementioned paragraphs address the Defence Honours and Awards Appeals Tribunal's request for Defence to analyse Rifle Company Butterworth service in the period 1970 to 1989 against the elements of each of the 1993 and 2018 Nature of Service definitions.

2.75 This assessment concludes that Rifle Company Butterworth service is not supported by the 1993 or 2018 nature of service warlike or non-warlike classifications, however, Rifle Company Butterworth service does accord with the elements of the 2018 nature of service peacetime service classification.